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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-4154

WESLEY WARD,
Appellant,

v.

STATE OF ILLINOIS,
Appellee.

On Appeal from the Supreme Court for the State of Illinois

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

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The appellant, Wesley Ward, appeals from the judgment and opinion of the Illinois Supreme Court pronounced May 14, 1976, and the denial of appellant's timely petition for rehearing, by the Illinois Supreme Court, on June 28, 1976. This jurisdictional statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are present.

OPINIONS BELOW

The opinion of the Appellate Court for the State of Illinois, Third District, announced on February 20, 1975, is reported at 25 Ill.App.3d 1045, 324 N.E.2d 205 (1975). A copy of the opinion is attached in the appendix as Exhibit A.

The opinion of the Illinois Supreme Court, announced on May 14, 1976, is reported at 63 Ill.2d 437, 349 N.E.2d 47 (1976). A copy of the opinion is included in the appendix as Exhibit B. The order of the Illinois Supreme Court denying appellant's petition for rehearing was entered June 28, 1976, and is included in the appendix as Exhibit C.

JURISDICTION

This action was commenced by the filing of criminal complaints charging the defendant with the crime of obscenity, under Chapter 38, § 11-20, Illinois Revised Statutes. The defendant filed a pre-trial motion to dismiss, as well as motions for judgment at the close of the state's case in chief and at the close of all the evidence, which alleged, inter alia, that the publications which were the subject of the charge, were not obscene as a matter of law, and that Chapter 38, § 11-20 was unconstitutional, affronting constitutional rights afforded him by the First and Fourteenth Amendments to the Constitution of the United States. These motions were all denied. After a bench trial, the Honorable John A. Whitney found the defendant guilty of obscenity on April 4, 1972. The defendant was sentenced to one day in jail and fined the sum of $200 on April 17, 1972. His post-trial motion, again raising the aforementioned constitutional issues, was denied by the trial court on May 23, 1972.

The defendant-appellant appealed to the Illinois Appellate Court, Third District, and his conviction was affirmed. *People v. Ward*, 25 Ill.App.3d 1045, 324 N.E.2d 205 (1975).

The defendant-appellant appealed to the Illinois Supreme Court which rejected his claim that the Illinois Obscenity Statute was vague, indefinite, overbroad and uncertain, in violation of the constitutional rights guaranteed him by the First and Fourteenth Amendments to the Constitution of the United States as enunciated in *Miller v. California*, 413 U.S. 15 (1973). On May 14, 1976, the Illinois Supreme Court affirmed the defendant's conviction in a written opinion. His petition for rehearing was denied on June 28, 1976.

A notice of appeal from the aforesaid opinion and denial of rehearing by the Illinois Supreme Court was filed in the Illinois Supreme Court on August 13, 1976. A copy of the said notice of appeal is included in the Appendix as Exhibit D. Jurisdiction of the United States Supreme Court to review the decision of the Illinois Supreme Court by appeal is conferred by Title 28, United States Code, § 1257 (2). *Cohen v. California*, 403 U.S. 15, 17, 18 (1971), (reh. den. 404 U.S. 876 (1971); *Dahnke-Walker Mining Co. v. Bondurant*, 257 U.S. 282, 287-290 (1921).

QUESTIONS PRESENTED

1. Whether the provisions of the Illinois Obscenity Statute, Chapter 38, § 11-20, Illinois Revised Statutes, on its face and as construed by the Illinois Supreme Court, are vague, indefinite, overbroad and uncertain, in violation of the free speech and press and due process provisions of the First and Fourteenth Amendments to the Constitution of the United States.

2. Whether the publications, "Bizarre World" and "Illustrated Case Histories, a Study of Sado-Masochism" are constitutionally protected, as a matter of law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the First and Fourteenth Amendments to the United States Constitution; and the Illinois Obscenity Statute, Chapter 38, § 11-20, Illinois Revised Statutes, are set forth in the appendix as Exhibit E.

STATEMENT

Appellant was convicted of the offense of obscenity, after a bench trial, in the Circuit Court of Peoria County, Illinois, in April, 1972. Appellant's motions attacking the constitutionality of the Illinois Obscenity Statute and asserting the non-obscenity and protectability of the two publications, "Bizarre World" and "Illustrated Case Histories, a Study of Sado-Masochism" which he was charged with selling, were denied by the trial court. Appellant appealed to the Appellate Court for the State of Illinois, Third District.

At the time of appellant's appeal, the Illinois Supreme Court had rendered its decision in *People v. Ridens*, 51 Ill.2d 410, 282 N.E.2d 691 (1972) (hereinafter referred to as *Ridens I*). While his appeal was pending, *Ridens I* was vacated and remanded for reconsideration in light of *Miller v. California*, 413 U.S. 15 (1973); see *Ridens v. Illinois*, 413 U.S. 912 (1973). The decision in the Appellate Court was further stayed pending reconsideration of the Illinois Obscenity Statute by the Illinois Supreme Court. In *People v. Ridens*, 59 Ill.2d 362, 321 N.E.2d 264 (1974) (hereinafter referred to as *Ridens II*), the Illinois Supreme Court held that the Illinois Obscenity Statute was still constitutional. A petition for a writ of certiorari was denied. *Ridens v. Illinois*, 421 U.S. 993 (1975).

The Third District Appellate Court announced its decision in February, 1975, affirming the appellant's conviction. Appellant thereafter sought review by the Illinois Supreme Court by a petition for leave to appeal which was granted in May, 1975. The cause was briefed and oral argument held in the Illinois Supreme Court on March 9, 1976. While the opinion and judgment were pending, a three-judge federal court was convened in the Northern District of Illinois to consider the constitutionality of the Illinois Obscenity Statute in light of the mandate of *Miller v. California*, 413 U.S. 15 (1973), in a cause entitled *Eagle Books, Inc. et al. v. Reinhard, et al.*, — F.Supp. — (three-judge, U.S.D.C., N.D.Ill., W.D., No. 76-C-20014, 5/28/76). (See opinion in appendix as Exhibit F attached) Oral argument in the three-judge case was held the same day the Illinois Supreme Court announced its decision in *People v. Ward*, where the Illinois Supreme Court again upheld the constitutionality of the Illinois Obscenity Statute, stating:

> "In *People v. Ridens*, 51 Ill.2d 410, we affirmed the convictions of defendants who had been found guilty of violating, *inter alia*, the Illinois obscenity statute by selling obscene publications. The United States Supreme Court subsequently remanded that case and directed us to reconsider our decision in light of the principles announced in *Miller* and related decisions. (*Ridens v. Illinois*, 413 U.S. 912, 37 L.Ed.2d 1030, 93 S.Ct. 3046.) This court again affirmed the convictions and found that the Illinois obscenity statute was constitutional. (*People v. Ridens*, 59 Ill.2d 362, *cert. denied*, 421 U.S. 993, 44 L.Ed.2d 483, 95 S. Ct. 2000 (hereinafter referred to as *Ridens* II.) It was held in Ridens II that the obscenity statute was sufficiently clear and that it adequately informed the public of the conduct whose depiction is proscribed. We noted that the statutory definition of obscenity includes within the scope of the 'prurient interest' a 'shameful or morbid interest in nudity, sex or excretion.' The defendant argues that we erred in Ridens II in our interpretation of *Miller* and that *Miller* requires obscenity statutes to be much more specific

in defining the type of material which will be considered obscene. We see no reason to reconsider our decision in Ridens II. It is extremely difficult to define the term 'obscenity' with a fine degree of precision. We again express our opinion that Illinois' statutory definition is sufficiently clear to withstand constitutional objections."

People v. Ward, 63 Ill.2d at 440, 441, 349 N.E.2d at 48, 49.

The Court also held that the publications in issue were not constitutionally protected.

Subsequently, on May 28, 1976, the three-judge federal court held that the Illinois Obscenity Statute was unconstitutional for its failure to meet the specificity requirements of *Miller v. California, supra. Eagle Books et al. v. Reinhard et al.*, — F.Supp. — (three-judge, U.S.D.C., N.D. Ill., W.D., No. 76-C-20014, 5/28/76). That court specifically noted the Illinois Supreme Court's decision in *People v. Ward*, 63 Ill.2d 437, 349 N.E.2d 47 (1976), but, nonetheless, held the statute constitutionally invalid. On July 12, 1976, the Attorney General for the State of Illinois filed a notice of appeal to the United States Supreme Court from the decision of the three-judge court in *Eagle Books*. On August 13, 1976, the appellant, Wesley Ward, filed a notice of appeal to the United States Supreme Court, from the decision of the Illinois Supreme Court. The appellant's sentence of one day in jail and a $200 fine was stayed pending review by the United States Supreme Court.

THE QUESTIONS ARE SUBSTANTIAL

The Illinois Obscenity Statute, Chapter 38, § 11-20, Illinois Revised Statutes, under which the appellant was convicted, is unconstitutional because it fails to meet the specificity requirements of *Miller v. California*, 413 U.S. 15 (1973). This in-

validity exists in the statute both as written and as construed by the Illinois Supreme Court in *Ridens II*, 59 Ill.2d 362, 321 N.E.2d 264 (1974), cert. den., 421 U.S. 993 (1975). *Eagle Books, Inc., et al. v. Reinhard, et al.*, — F.Supp. — (three-judge, U.S.D.C., W.D. Ill., No. 76-C-20014, 5/28/76). The statute contains no specific definition of sexual conduct, the description or depiction of which, renders material patently offensive and potentially obscene. Illinois has never specifically defined, either in its legislation or by judicial construction, the sexual conduct which may not be depicted or described. Illinois has declined to do so because obscenity, it is held, cannot be defined with "precision."

Constitutional Standards Under Miller v. California

This Court outlined new constitutional standards which must be met in the regulation by states of sexually oriented material in June, 1973, in *Miller v. California*, 413 U.S. 15 (1973). In introducing those standards, the Court stated:

> "We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. See *Interstate Circuit, Inc. v. Dallas, supra*, at 682-685. As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed." (footnote omitted)
>
> *Miller v. California*, 413 U.S. 15 at 23, 24.

The Court then pronounced the standards for the determination of obscenity by the trier of fact which were stated to be:

> "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as

a whole, appeals to the prurient interest, *Kois v. Wisconsin, supra*, at 489; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

Miller v. California, 413 U.S. at 24.

To fully appreciate the impact of these new standards, a comparison should be made with the standards existing prior to *Miller*. A tripartite test, labeled the *Roth-Memoirs* standard because of its promulgation from *Roth v. United States*, 354 U.S. 476 (1957), and *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), provided that for material to be considered obscene:

"(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

Memoirs v. Massachusetts, 383 U.S. at 418.

The *Miller* test represents an effort by the Court to satisfy the constitutional requirements of due process notice in conjunction with the free speech and press provisions of the United States Constitution. This is done by a delineation or listing of explicit sexual conduct in the *Miller* examples to demonstrate that it is "sexual conduct" and not "sexual matters" that are to be proscribed under the tripartite *Miller* test. In those examples under part (b), the Court suggested that a state regulatory statute could define the prohibited sexual conduct as:

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."

Miller v. California, 413 U.S. at 25.

Under this new *Miller* test the Court felt content that "these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution." *Miller v. California*, 413 U.S. at 27.

With these new guidelines this Court vacated judgments in some 68 cases, and remanded them to lower courts for reconsideration in light of these new constitutional principles.

Post-Miller Statutory Construction

There were a substantial number of cases involving the construction of state statutes at the time of the decision in *Miller* and its companion cases which were pending before the United States Supreme Court. Those cases on the remand, and other cases in both state and federal courts have been considered in light of *Miller*, with the view that the *Miller* test now provides the constitutional standard for pre-*Miller* statutes.

These post-*Miller* cases concerning pre-*Miller* statutes fall into three basic categories. First, a statute as written may supply the necessary specificity under part (b) of the tripartite test in terms which are consistent with the *Miller* examples. *State v. Liles*, 537 P.2d 1182 (Ore., 1975), cert. den. — U.S. —, 95 S.Ct. 1749 (1976). Second, where a statute as written does not supply the needed specificity, and prior state court decisions provide authority to construe the statute to either adopt the *Miller* examples or to delineate a list of prohibited sexual conduct, the statute may be construed to be constitutional. *Pierce v. State*, 292 Ala. 473, 296 So.2d 218

(1974), cert. den. 419 U.S. 1130 (1975); *Gibbs v. State*, 255 Ark. 997, 504 S.W.2d 719 (1974); *People v. Enskat*, 33 Cal.App.3d 900, 109 Cal.Rptr. 433 (1973), cert. den. 418 U.S. 937 (1975); *Miller v. California*, 418 U.S. 915 (1974); *Bloom v. Municipal Court*, 127 Cal.Rptr. 317, 545 P.2d 229 (1976); *Rhodes v. State*, 283 So.2d 359 (Fla., 1973); *Slaton v. Paris Adult Theatre I*, 231 Ga. 312, 201 S.E.2d 456 (1973), cert. den. 418 U.S. 939 (1974); *State v. A Motion Picture Entitled "The Bet,"* 547 P.2d 760 (Kan. S.Ct., 1976); *Ebert v. Maryland State Board of Censors*, 19 Md.App. 300, 313 A.2d 536 (1973), cert. den. 419 U.S. 1074 (1974); *McNary v. Carlton*, 527 S.W.2d 343 (Mo., 1975); *State v. Little Art Corporation*, 191 Neb. 448, 215 N.W.2d 853 (1974); *State v. Harding*, 114 N.H. 335, 320 A.2d 646 (1974); *People v. Heller*, 33 N.Y.2d 314, 307 N.E.2d 805 (1973); *State v. Bryant*, 285 N.C. 27, 203 S.E.2d 27 (1974), cert. den. 419 U.S. 974 (1974); *State ex rel. Keating v. Vixen*, 35 Ohio St. 2d 215, 301 N.E.2d 880 (1973); *McCrary v. State*, 533 P. 2d 629 (Okla., 1974); *State v. Watkins*, 262 S.C. 178, 203 S.E.2d 429 (1973), app. dismissed 418 U.S. 911 (1974); *West v. State*, 514 S.W.2d 433 (Tex., 1974); *Price v. Commonwealth*, 214 Va. 490, 201 S.E.2d 798 (1974), cert. den. 419 U.S. 902 (1974); *State v. J. R. Distributors, Inc.*, 82 Wash.2d 584, 512 P.2d 1049 (1973), cert. den. 418 U.S. 949 (1974); *State ex rel. Chobot v. Circuit Ct. for Milwaukee County*, 61 Wis.2d 354, 212 N.W.2d 690 (1973).

Third, a state statute may provide no indication for delineation of sexual conduct and prior decisional law may provide no authority for so construing a statute, thereby rendering the statute unconstitutional for vagueness. *People v. Tabron*, 547 P.2d 372 (Col., 1976); *Mohney v. State*, 261 Ind. 58, 300 N.E.2d 66 (1973); *Stroud v. State*, 261 Ind. 56, 300 N.E.2d 100 (1973); *State v. Wedelstedt*, 213 N.W.2d 652 (Ia., 1973); *State v. Shreveport News Agency, Inc.*, 287 So.2d 464 (1973); *State v. McNutt*, 287 So.2d 478 (1973); *Commonwealth v.*

Horton, 310 N.E.2d 316 (Mass., 1974); *People v. Bloss*, 394 Mich. 79, 228 N.W.2d 384 (1975); *State v. Welke*, 298 Minn. 402, 216 N.W.2d 641 (1974); *ABC Interstate Theatres, Inc. v. State*, 325 So.2d 123 (Miss., 1976); *State v. DeSantis*, 65 N.J. 462, 323 A.2d 489 (1974); *McCright v. Olson*, 367 F. Supp. 937 (three-judge court, U.S.D.C., N.D., 1973); *Commonwealth v. McDonald*, 347 A.2d 290 (Pa., 1975); *Commonwealth v. Burak*, 232 P.Super. 499, 335 A.2d 820 (1975).

The necessity for specific delineation in states' obscenity statutes was underscored in *Jenkins v. Georgia*, 418 U.S. 153 (1974). There the United States Supreme Court reversed a jury verdict finding the film "Carnal Knowledge" obscene. Justice Rehnquist, speaking for the court stated that:

> "We . . . took pains in *Miller* to 'give a few plain examples of what a state statute could define for a regulation under part (b) of the standard announced,' that is, the requirement of patent offensiveness. . . . These examples include 'representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated,' and 'representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.' . . . While this did not purport to be an exhaustive catalog of what juries might find patently offensive, it was certainly intended to fix substantive constitutional limitations, deriving from the First Amendment, on the type of material subject to such a determination."
>
> *Jenkins v. Georgia*, 418 U.S. at 160-161.

Thus, it can be said that specificity is the keystone of the *Miller* tripartite test. Indeed, this Court after *Miller* had occasion to construe the federal obscenity statute, Title 18, United States Code, § 1461 et seq., in *Hamling v. United States*, 418 U.S. 87 (1974). In *Hamling*, the Court relied on a prior judicial interpretation of the statute in *United States v. 12,200 Ft. Reels of*

Film, 413 U.S. 123 (1973), and adopted by construction, the two *Miller* examples of patently offensive sexual conduct to bring the federal obscenity statute within the standards of *Miller v. California*, 413 U.S. 15 (1973).

In view of the importance of the specificity requirement under *Miller*, *Jenkins* and *Hamling*, it is submitted that the three categories of cases are proper, acceptable interpretations of the *Miller* standards in relation to pre-*Miller* obscenity statutes. A review of the Illinois Obscenity Statute, through the time of the affirmance of the appellant's conviction, demonstrates that a *Hamling*-type construction has never been placed on the Illinois Obscenity Statute, and with no specificity written into the statute, it is clear that the statute does not fit into any of the categories of cases above, and is plainly unconstitutional. *Eagle Books v. Reinhard*, — F.Supp. — (three-judge, U.S.D.C., N.D., Ill., No. 76-C-20014, 5/28/76). See also, *Rabe v. Washington*, 405 U.S. 313 (1972).

The Illinois Obscenity Statute

The Illinois Supreme Court in *Ridens I*, 51 Ill.2d 410, 282 N.E.2d 691 (1972), construed the Illinois Obscenity Statute to comply with the *Roth-Memoirs* standard. The court specifically included within the Illinois definition of obscenity the third of the tripartite standard that material must be "utterly without redeeming social importance." *Ridens I*, 51 Ill.2d at 414, 282 N.E.2d at 694.

A petition for certiorari was granted by this Court, and the cause was vacated and remanded to the Illinois Supreme Court for consideration in light of *Miller v. California*, *Ridens v. Illinois*, 413 U.S. 912 (1973).

On the remand, the Illinois Supreme Court was faced with the same construction problems that have been noted in the

categories of cases discussed ante. The Court had to consider whether the statute as written met the part (b) specificity mandated by *Miller*, whether prior Illinois decisions provided authority for a judicial construction of the statute to provide the needed specificity, or whether the statute was unconstitutional. In *Ridens II*, 59 Ill.2d 362, 321 N.E.2d 264 (1974), the Illinois Supreme Court failed to place the Illinois Obscenity Statute within any of the three accepted categories of post-*Miller* decisions.

In *Ridens II*, when confronted with the *Miller* construction problems, although paying lip service to *Miller*, the Illinois Supreme Court failed to provide the *Miller*-mandated specificity that was lacking in the statute. The court held the statute constitutional in spite of vagueness and overbreadth attacks, by relying on *Grayned v. City of Rockford*, 408 U.S. 104 (1972), (an anti-noise ordinance held constitutional) and *People v. Raby*, 40 Ill.2d 392, 240 N.E.2d 595 (1968), (disorderly conduct statute held constitutional).

In an analytical dissent, Justice Davis specifically addressed the construction questions presented by *Miller*. Justice Davis concluded that the statute as written did not provide specificity and past Illinois cases could not be authority for any judicial construction; therefore, a legislative response was needed. In short, the statute was unconstitutional. *Ridens II*, 59 Ill.2d at 375-389, 321 N.E.2d at 271-278. It should be noted that Justice Davis was the author of the opinion in *Ridens I* which construed the Illinois Obscenity Statute to bring it within the *Roth-Memoirs* standards.

After *Ridens II*, and prior to appellant's case, the Illinois Supreme Court had two additional opportunities in which to address itself to the *Miller* issues. In *People v. Hume, Inc.*, 60 Ill.2d 397, 327 N.E.2d 329 (1975) and *People v. Gould*, 60 Ill.2d 159, 324 N.E.2d 412 (1975), the court reaffirmed

its ruling in *Ridens II*. With this background the appellant Ward specifically asked the court to address itself to the *Miller* construction issues.

In the opinion below, the Illinois Supreme Court again reaffirmed *Ridens II*, rejecting any possible construction of the statute to give it specificity. The court held that obscenity cannot be defined with "precision" and affirmed the appellant's conviction. In doing so, the Illinois Supreme Court has failed to address the very issue upon which the multitude of state obscenity cases have turned, that is, specificity. Obscenity may not be able to be defined with "precision" but it can nonetheless be defined in accordance with *Miller v. California*. By failing to give the statute just such a definition or to declare the statute unconstitutional, and failing to give the appellant the benefit of any saving construction, the Illinois Supreme Court has committed constitutional error in appellant's case.

The identical analysis and argument concerning the role of the Illinois Supreme Court and the Illinois Obscenity Statute was presented and adopted by a three-judge federal court, after *People v. Ward*, 63 Ill.2d 437, 349 N.E.2d 47 (1976), on May 28, 1976, in *Eagle Books, Inc. v. Reinhard*, . . . F.Supp. . . . (three-judge, U.S.D.C., N.D.Ill, 5/28/76). Indeed, that court concluded:

> "This court does not believe *Miller* can be properly construed as allowing the actual language of Section 11-20 to be specific without the judicial engrafting of *Miller*-type examples, or other specifications such as those articulated in Justice Davis's dissent in *Ridens II*. As no such specification has been supplied by the Illinois Supreme Court, this court holds that Section 11-20, as construed, is constitutionlly invalid."
>
> *Eagle Books, Inc. v. Reinhard*, . . . F. Supp. . . . (Three-judge, U.S.D.C., N.D.Ill., 5/28/76) (A-26).

That court concluded that the Illinois Obscenity Statute was unconstitutional. The Attorney General of the State of Illinois has filed a notice of appeal to the United States Supreme Court from that three-judge decision. It is submitted that the decision of that three-judge court is correct and that appellant's appeal should be granted, and on authority of *Eagle Books v. Reinhard*, his conviction be reversed. Proper appeal jurisdiction, pursuant to 28 U.S.C., § 1257 (2), is present in the case because the Illinois Supreme Court, the highest state court in Illinois, in answering appellant's constitutional attacks on the Illinois Obscenity Statute, has ruled in favor of the validity of the statute.

Obscenity of the Material

The United States Supreme Court has determined that it is required to make an independent judicial review to determine whether or not the material is constitutionally protected. *Jenkins v. Georgia*, 418 U.S. 153 (1974). In this case the appellant has asked the Clerk of the Illinois Supreme Court to certify the publications under which he was convicted, "Bizarre World" and "Illustrated Case Histories: A Study of Sado-Masochism."

Under the standards of *Miller v. California*, only hard core sexually explicit material can be the subject of state regulation. *Miller v. California*, 413 U.S. at 27 (1973). *Miller* equates "hard core" with materials which contain patently offensive representations of "ultimate sexual acts, masturbation, excretory functions, and lewd exhibition of the genitals." *Miller v. California*, 401 U.S. at 25. A review of the publications in issue in this case will demonstrate that they are entitled to constitutional protection. Therefore, it was error for the Illinois Supreme Court to conclude, on independent judicial review, that the materials were obscene.

These materials should be found constitutionally protected and appellant's conviction should be reversed.

CONCLUSION

It is submitted that the decision of the Illinois Supreme Court below, has resulted in the deprivation of appellant's life without due process of law and in violation of the free speech and press provisions of the First and Fourteenth Amendments. A DIRECT CONFLICT EXISTS BETWEEN THE DECISION OF THE FEDERAL THREE-JUDGE COURT IN *EAGLE BOOKS* AND THE ILLINOIS SUPREME COURT IN *WARD*. The existence of the statute in its present form undermines the rights of other individuals similarly situated with appellant. Appellant submits that the questions for review are substantial and of great public importance.

Respectfully submitted,

DONALD M. RENO, JR.

J. STEVEN BECKETT
RENO, O'BYRNE & KEPLEY
501 West Church
Champaign, Illinois 61820
Attorneys for Appellant

APPENDIX

EXHIBIT A

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, *v.* WESLEY WARD, Defendant-Appellant

(No. 72-200; Judgment affirmed)

Third District—February 20, 1975

* * * * * * *

APPEAL from the Circuit Court of Peoria County; the Hon. JOHN A. WHITNEY, Judge, presiding.

Reno, O'Byrne & Kepley, of Champaign (Donald M. Reno, Jr., of counsel), for appellant.

Michael Mihm, State's Attorney, of Peoria (Thomas M. Pennell, Assistant State's Attorney, of counsel), for the People.

Mr. JUSTICE STOUDER delivered the opinion of the court:

This is an appeal from the judgment of the circuit court of Peoria County finding defendant, Wesley Ward, guilty of violating section 11-20(a)(1) of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 11-20(a)(1)) by selling two obscene publications. Defendant waived a jury and after bench trial was found guilty and sentenced to 1 day in jail and fined $200. The only witness for the State was the complaining police officer who testified he purchased the two publications, "Bizarre World" and "Illustrated Case Histories, a Study of Sado-Masochism," at defendant's store. The police officer's testimony and the magazines themselves were the sole evidence presented by the State. Defendant presented no evidence, and after his motion for judgment was denied, judgment was entered against the defendant.

There are three principal issues on this appeal. The resolution on each of these is governed by the case of *People v. Ridens*, 51 Ill.2d 410, 282 N.E.2d 691, which was granted certiorari by the United States Supreme Court in 413 U.S. 912, 37 L.Ed.2d 1030, 93 S.Ct. 3046. The Supreme Court vacated the judgment and remanded the case to the Illinois Supreme Court, 59 Ill.2d 362, which affirmed the convictions of the defendant. The United States Supreme Court, in vacating and remanding the initial decision in the *Ridens* case, directed the Illinois Supreme Court to reconsider the case in light of the holdings of the United States Supreme Court in *Miller v. California*, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607, and other related cases decided by the Court at the same time. After reconsideration of the *Ridens* case the Illinois Supreme Court reaffirmed the defendant's conviction and concluded that the Illinois obscenity statute (Ill. Rev. Stat. 1969, ch. 38, par. 11-20) complied with the standards announced in the United States Supreme Court cases.

1. The first issue is whether the State's evidence consisting of magazines made up almost exclusively of photographs constituted sufficient proof to establish violation of the obscenity statute and, therefore, whether the failure to present opinion testimony as to contemporary community standards was fatal to the State's case. The Illinois Supreme Court in *People v. Ridens*, 51 Ill.2d 410, 282 N.E.2d 691, held that such opinion testimony was not required. The court there held that the publications themselves constituted sufficient evidence to support defendant's conviction for violating the statute.

2. The second issue is whether it was necessary for the State to prove either the sale to minors or the intrusion upon the privacy of unwilling adults in order to convict defendant of violating the statute by selling the magazines. The court in *People v. Ridens*, 51 Ill.2d 410, 282 N.E.2d 691, held that defendant's claim that the obscenity ordinance and code were

deficient because they did not require proof that the offending publications were sold to minors or intruded upon the privacy of unwilling adults was without merit. In accord with this case, we hold here that it was not necessary for the State to prove either the sale to minors or the intrusion upon the privacy of unwilling adults.

3. The final issue on this appeal is whether the two publications were obscene as a matter of law. Again, the case of *People v. Ridens*, 51 Ill.2d 410, 282 N.E.2d 691, is dispositive of the issue in the case at bar. The magazines in this case do not differ in any substantial sense from the magazines described in *Ridens*, and they fall within that category prohibited by the statute. See also *People v. Gould*, 60 Ill.2d 159.

For the foregoing reasons the judgment of the circuit court of Peoria County is affirmed.

Judgment affirmed.

DIXON, J., and SCOTT, P. J., concur.

EXHIBIT B

(No. 47479.—Judgment affirmed.)

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee,
v. WESLEY WARD, Appellant.

Opinion filed May 14, 1976.—Rehearing denied June 28, 1976.

* * * * * * *

Appeal from the Circuit Court of Peoria County; the Hon. John A. Whitney, Judge, presiding.

Donald M. Reno, Jr., and J. Steven Beckett, of Reno, O'Byrne & Kepley, of Champaign, for appellant.

William J. Scott, Attorney General, of Springfield, and Michael M. Mihm, State's Attorney, of Peoria (Jayne A. Carr and Raymond McKoski, Assistant Attorneys General, of counsel), for the People.

MR. JUSTICE CREBS delivered the opinion of the court:

The defendant was convicted of the offense of obscenity after a bench trial in the circuit court of Peoria County. The court ruled that the defendant, the operator of a book store, had violated section 11—20(a)(1) of the Criminal Code of 1961 (Ill. Rev. Stat. 1971, ch. 38, par. 11—20(a)(1)) by selling two obscene publications. The defendant was sentenced to spend one day in the county jail and was fined $200 and costs.

The defendant presented no evidence in his own behalf at trial but did file a motion for a directed verdict at the close of the State's case. After this motion was denied and a judgment of conviction was entered, the defendant filed a post-trial motion in which he alleged, *inter alia*, that the obscenity statute

was unconstitutional and that the magazines in question were constitutionally protected. The post-trial motion was denied, and the defendant's conviction was subsequently affirmed. (*People v. Ward*, 25 Ill. App. 3d 1045.) We have granted defendant's petition for leave to appeal to this court.

The defendant first contends that the Illinois obscenity statute is unconstitutional in that it does not specifically define the type of sexual conduct that may not be depicted. The defendant relies on the case of *Miller v. California*, 413 U.S. 15, 37 L.Ed. 2d 419, 93 S. Ct. 2607, in which the United States Supreme Court announced new criteria to be used in judging the constitutionality of obscenity statutes. The court determined that the three questions to be considered in such a case are: "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest [citations]; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." The Supreme Court stated that the conduct whose depiction is proscribed by obscenity statutes must be "specifically defined by the applicable state law, as written or authoritatively construed." 413 U.S. 15, 24, 37 L. Ed. 2d 419, 430-31, 93 S. Ct. 2607, 2615.

The Illinois obscenity statute states in pertinent part:

"(a) Elements of the Offense.

A person commits obscenity when, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, he:

(1) Sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene writing, pic-

ture, record or other representation or embodiment of the obscene;

* * * * * * *

(b) Obscene Defined.

A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs." (Ill. Rev. Stat. 1971, ch. 38, par. 11-20.)

The defendant now argues that the statute does not sufficiently define the type of conduct whose depiction is proscribed.

In *People v. Ridens*, 51 Ill.2d 410, we affirmed the convictions of defendants who had been found guilty of violating, *inter alia*, the Illinois obscenity statute by selling obscene publications. The United States Supreme Court subsequently remanded that case and directed us to reconsider our decision in light of the principles announced in *Miller* and related decisions. (*Ridens v. Illinois*, 413 U.S. 912, 37 L. Ed. 2d 1030, 93 S. Ct. 3046.) This court again affirmed the convictions and found that the Illinois obscenity statute was constitutional. (*People v. Ridens*, 59 Ill.2d 362, *cert. denied*, 421 U.S. 993, 44 L. Ed. 2d 483, 95 S. Ct. 2000 (hereinafter referred to as Ridens II).) It was held in Ridens II that the obscenity statute was sufficiently clear and that it adequately informed the public of the conduct whose depiction is proscribed. We noted that the statutory definition of obscenity includes within the scope of the "prurient interest" a "shameful or morbid interest in nudity, sex or excretion." The defendant argues that we erred in Ridens II in our interpretation of *Miller* and that *Miller* requires obscenity statutes to be much more specific in defining the type of material

which will be considered obscene. We see no reason to reconsider our decision in Ridens II. It is extremely difficult to define the term "obscenity" with a fine degree of precision. We again express our opinion that Illinois' statutory definition is sufficiently clear to withstand constitutional objections.

The defendant also contends that the obscenity statute is unconstitutional as applied to him because the State elicited no evidence suggesting that the publications in question were forced upon unwilling audiences or made available to juveniles. The defendant argues that the statute cannot be constitutionally applied to cases in which the sexually explicit materials are sold or distributed only to consenting adults. This argument is based on the allegation that contemporary community standards are not offended unless the obscene materials are forced upon unwilling audiences or made available to minors.

The defendant's argument is without merit. Contemporary community standards are relevant in determining whether a publication is obscene but bear no relevance to the questions of how or to whom obscene materials may be distributed. If a publication is determined to be obscene, it is not entitled to constitutional protection. (*Miller v. California*, 413 U.S. 15, 23, 37 L. Ed. 2d 419, 430, 93 S. Ct. 2607, 2614.) The Illinois General Assembly chose to make the commercial distribution of obscene materials a crime. This was within the police power of the State. The sale of obscene publications is a violation of the criminal law, therefore, even if the publications are not forced upon unwilling audences or made available to minors.

The final contention made by the defendant is that the two publications are not obscene and thus are entitled to protection under the first amendment to the United States Constitution and article I, section 4, of the Illinois Constitution. In obscenity cases, a reviewing court must make an independent constitutional judgment on the facts of the case as to whether the ma-

terial involved is constitutionally protected. (*People v. Ridens*, 59 Ill.2d 362.) After reviewing the publications at issue in this case, we have no hesitation in affirming the holding of the lower courts that the materials are in fact obscene. We find that the average person applying contemporary community standards would consider that, taken as a whole, the sole appeal of the two publications is to the prurient interest and that the dominant theme of the magazines is a morbid interest in nudity and sex. Moreover, we regard the publications as depicting, in a patently offensive way, sexual conduct defined by the obscenity statute, as authoritatively construed in Ridens II. In addition, the magazines go substantially beyond customary limits of candor in such depiction. We also find that the magazines have no literal or artistic merit and that they are utterly without redeeming social value. For the foregoing reasons we hold that the two publications are obscene, and the judgment of the appellate court is affirmed.

Judgment affirmed.

EXHIBIT C

State of Illinois
Office of
Clerk of the Supreme Court
Springfield
62706

Clell L. Woods
Clerk

Telephone
Area Code 217
782-2035

June 28, 1976

Mr. J. Steven Beckett
Reno, O'Byrne & Kepley
Attorneys at Law
501 West Church Street
Champaign, Illinois 61820

No. 47479—People State of Illinois, appellee, v. Wesley Ward, appellant. Appeal, Appellate Court, Third District

You are hereby notified that the Supreme Court today denied the petition for rehearing in the above entitled cause.

Very truly yours,

/s/ Clell L. Woods
Clerk of the Supreme Court

EXHIBIT D

General No. 47479

In the
SUPREME COURT
of the
STATE OF ILLINOIS

People of the State of Illinois, Plaintiff-Appellee, v. Wesley Ward, Defendant-Appellant.	Appeal from the Circuit Court of Peoria County Honorable John A. Whitney, Judge Presiding Appeal from the Appellate Court of the State of Illinois, Third District

NOTICE OF APPEAL

Notice is hereby given that Wesley Ward, defendant-appellant in the above captioned-cause, appeals to the Supreme Court of the United States from an opinion dated May 14, 1976, entered by the Supreme Court of the State of Illinois, and from the order of the said Supreme Court of the State of Illinois, dated June 28, 1976, denying the Petition for Rehearing filed by the defendant-appellant. Said opinion of the Illinois Supreme Court upheld the constitutionality of Illinois Revised Statutes (1976), Chapter 38, § 11-20, and held certain materials unprotected by the Constitution of the United States,

which materials the defendant was convicted of distributing. Defendant-appellant takes this appeal pursuant to 28 U.S.C. 1257 (2).

Respectfully submitted,

J. Steven Beckett
Reno, O'Byrne & Kepley
501 West Church
Champaign, Illinois 61820
Attorney for Defendant-Appellant

EXHIBIT E

First Amendment Constitution of the United States

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances.

Fourteenth Amendment Constitution of the United States

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

Chapter 38—Criminal Law and Procedure 38 § 11-21

11-20. § 11-20. **Obscenity.)** (a) Elements of the Offense.

A person commits obscenity when, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, he:

(1) Sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene; or

(2) Presents or directs an obscene play, dance or other performance or participates directly in that portion thereof which makes it obscene; or

(3) Publishes, exhibits or otherwise makes available anything obscene; or

(4) Performs an obscene act or otherwise presents an obscene exhibition of his body for gain; or

(5) Creates, buys, procures or possesses obscene matter or material with intent to disseminate it in violation of this Section, or of the penal laws or regulations of any other jurisdiction; or

(6) Advertises or otherwise promotes the sale of material represented or held out by him to be obscene, whether or not it is obscene.

(b) Obscene Defined.

A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs.

(c) Interpretation of Evidence.

Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience.

Where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that material is being commercially exploited for the sake of its prurient appeal,

such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

In any prosecution for an offense under this Section evidence shall be admissible to show:

(1) The character of the audience for which the material was designed or to which it was directed;

(2) What the predominant appeal of the material would be for ordinary adults or a special audience, and what effect if any, it would probably have on the behavior of such people;

(3) The artistic, literary, scientific, educational or other merits of the material, or absence thereof;

(4) The degree, if any, of public acceptance of the material in this State;

(5) Appeal to prurient interest, or absence thereof, in advertising or other promotion of the material;

(6) Purpose of the author, creator, publisher or disseminator.

(d) Sentence.

Obscenity is a Class A misdemeanor. A second or subsequent offense is a Class 4 felony.

(e) Prima Facie Evidence.

The creation, purchase, procurement or possession of a mold, engraved plate or other embodiment of obscenity specially adapted for reproducing multiple copies, or the possession of more than 3 copies of obscene material shall be prima facie evidence of an intent to disseminate.

(f) Affirmative Defenses.

It shall be an affirmative defense to obscenity that the dissemination:

(1) Was not for gain and was made to personal associates other than children under 18 years of age;

(2) Was to institutions or individuals having scientific or other special justification for possession of such material.

Amended by P.A. 77-2638, § 1, eff. Jan. 1, 1973.

EXHIBIT F

United States District Court
Northern District of Illinois
Western Division

Eagle Books, Inc., a Delaware Corporation, George Robert Hobbs, James E. Talkington, Jacqueline D. Davis, Shawnee Elmore, Robert Gosney, Michael Milazzo, Ira Jerry Ferrell, and David J. Foss,
Plaintiffs,

v.

Philip Reinhard, Individually and in His Capacity as State's Attorney of Winnebago County, Illinois, and Delbert Peterson, Individually and in His Capacity as Chief of Police of the City of Rockford, Illinois,
Defendants.

76 C 20014.

Before Cummings, Circuit Judge, and Will and Flaum, District Judges.

Memorandum Opinion

Flaum, District Judge. Plaintiffs are employees of bookstores and the corporate owner of those bookstores. They bring this suit to declare 38 Ill. Rev. Stats. §11-20 unconstitutional, and to enjoin defendant Philip Reinhard, State's Attorney of Winnebago County, Illinois, and defendant Delbert Peterson, Chief of Police of the City of Rockford, Illinois, from enforcing the

statute. Retrospective relief for prior activities carried out in connection with enforcement is also sought. Because of the injunctive nature of the relief requested against a state statute, a three judge court was requested under 28 U.S.C. § 2281. The substantiality of the federal question presented was discussed in a memorandum opinion issued by the single judge, issued April 15, 1976, which concluded with the convening of the present three judge court. In addition to the verified complaint, and the attached exhibits, representations of fact have been made through plaintiffs' Voluntary Bill of Particulars, motions and accompanying exhibits by both defendants for dismissal or summary judgment, and during oral argument held on May 14, 1976 before the three judge court. These sources are sufficient to dispose of this case. For the reasons which follow, prospective injunctive and declaratory relief will be granted with respect to the corporate defendant, and the suit will be dismissed with regard to the individual defendants without prejudice.

Facts

Plaintiff Eagle Books, Inc. ("Eagle Books") owns two bookstores in the City of Rockford, "The Adult Book and Cinema", and the "Hollywood Art Store". Individual plaintiffs were employed as salespersons in these stores. In a series of searches at least in part authorized by search warrants signed by state judges, Rockford police appeared at the Eagle Book stores on February 27, March 1, and March 3, 1976. They seized the films named in the warrants, as well as the film projectors that carried them, monies, business records, a cash register, safe, brief case, and other items. Another search was made on March 11. The warrants were limited to films, and were based on complaints signed by police officers characterizing the conduct portrayed in the movies and giving the opinion of the officers that the movies were obscene. In the course of these searches,

the individual plaintiffs were arrested under 38 Ill. Rev. Stats. § 11-20 for the selling of "obscene" materials. On March 5, two more employees of the bookstores were arrested on the same ground. They were subsequently added as plaintiffs in this lawsuit. In the course of the searches, seizures and arrests, the bookstores cannot operate, and temporarily cease business. It is uncontested that the bookstores sell, in addition to items which were seized as obscene, communicative material which is not obscene. (See defendant Peterson's Motion To Dismiss Or In The Alternative For Summary Judgment, at p. 6; Transcript of Oral Argument at p. 37).

Subsequent to the seizures of items from the bookstores, attempts were made by plaintiffs' attorneys to retrieve those items which were not specified in the warrant. For reasons not entirely clear to this court, plaintiffs' attorney felt obligated to refuse return of at least some of the items unless the State's Attorney would stipulate that those items had been seized in violation of the law. Such a stipulation was never offered, and the items have all, consequently, been retained. (See Tr. of Oral Argument at pp. 17-19).

An important ingredient of plaintiffs' allegations is the prospect that the procedure for obtaining warrants to seize "obscene" movies is unconstitutional in that it gives rise to confiscation of communicative materials without adequate provision for a hearing or for supervision by a magistrate or other judicial officer. However, alternative search procedures have since been exclusively utilized by the defendants as part of an agreement which obviated the need for a ruling by this court on plaintiffs' motion for a temporary restraining order. Defendants have not, however, conceded that their original procedure is unconstitutional.

Justiciability

Law enforcement officers intended to prosecute violations of Section 11-20. (See exhibit DD of "Exhibits For Defendant Reinhard's Motion To Dismiss Or For Summary Judgment"; Defendant Peterson's Motion To Dismiss, Or, In The Alternative For Summary Judgment At p. 6). Taken together with the number and nature of searches carried out on Eagle Books' premises prior to the filing of the complaint, this circumstance leads the court to find that the prospect of future enforcement of Section 11-20 in such a fashion as will disrupt the operations or deprive of materials the Adult Book and Cinema and the Hollywood Art Store is sufficiently immediate to give rise to a case or controversy under Article III of the Constitution. *Steffel v. Thompson*, 415 U.S. 452, 260 (1974).

Constitutionality of Section 11-20

The plaintiffs' challenge to the constitutionality of Section 11-20 revolves around the requirements set forth in *Miller v. California*, 413 U.S. 15 (1973). The circumstances under which *Miller* arose and the logical consequences of its holding and judgment merit examination to determine what it mandates state courts to do.

The *Miller* standards fall in two categories, a tripartite definition, and a requirement of specificity. The first category was described as follows:

> "The basic guidelines for the trier of fact must be (a) whether 'the average person, applying contemporary standards' would find that the work taken as a whole appeals to the prurient interest . . .; (b) whether the work depicts or describes, in a patently offensive way, *sexual, conduct specifically defined by the applicable state law;* and (c) whether the work, taken as a whole, lacks serious literary,

artistic, political or scientific value." Id. at p. 24-25 (citations omitted, emphasis added).

The second category is an elaboration of the specificity requirement alluded to in (b), above. *Miller* did not, however, set standards with its explanation of specificity; it merely gave examples of what would be sufficiently specific:

> "We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, supra:
>
> > "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
> >
> > "(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." Id. at p. 25.

It can be seen from these examples that mere "sexual conduct" is not specific enough to give adequate notice of what is being regulated as obscene, but with the addition of "the ultimate sexual act", it would be. Similarly, it can be seen that through the use of such examples, "excretory functions" can be incorporated into the "sexual conduct" of the (b) of the tripartite standard.

The tripartite standard of *Miller* was an embellishment on a tripartite standard then in use, originally promulgated in *Roth v. United States*, 354 U.S. 476 (1957), and *Memoirs v. Massachusetts*, 383 U.S. 413 (1966). The so-called *Roth-Memoirs* standard was that material could be regulated as obscene if:

> ". . . (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it confronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." *Memoirs v. Massachusetts, supra*, at p. 418, cited in *Miller v. California, supra*, at p. 21.

A comparison of the two tripartite standards must take into account the facts confronting the *Miller* Court. A defendant had been convicted for knowingly distributing obscene matter, under the California Penal Code, § 311.2(a). The jury had been "instructed that, in determining whether the 'dominant theme of the material, taken as a whole . . . appeals to the prurient interest' and in determining whether the material 'goes beyond the customary limits of candor and affronts contemporary community standards of decency' it was to apply 'contemporary community standards of the State of California' instead of the national community standards." *Miller v. California*, 423 U.S. at p. 31. The court found these deviations from the prevailing view that a national standard should have been used did not give rise to a constitutional error. Thus, as far as the defendant was concerned, no complaint could be had as to the shift between the (a) and (b) of the respective standards, except for the specificity requirement alluded to in part (b) of the *Miller* tripartite standard. Conviction under part (c) of the *Memoirs* standard similarly could have no prejudice to one arguing for part (c) of *Miller*, for material utterly without redeeming social value, as that term had been defined, would a fortiori lack serious artistic, literary, political, or scientific value. It thus appears from this comparison that the greatest difference in obscenity law, so far as the defendant in *Miller* was concerned, was the specificity requirement, a requirement never formalized in *Miller*, but only exemplified. This appears to be the sole, if not the most important explanation for the judgment of *Miller*, which was to remand the case back to the California state appellate court.

Further importance of the specificity requirement, in terms of the remand, appears from the nature of the material which the defendant was convicted of distributing:

> "While the brochures contain some descriptive printed material, primarily they consist of pictures and drawings very explicitly depicting men and women in groups of two or more engaging in a variety of sexual activities, with genitals often prominently displayed." Id. at p. 19.

This material is more than coincidentally covered by the suggested specifying examples of *Miller*. If the specificity requirement were surplusage, no remand should have been necessary at all.

Cases after *Miller v. California* reasserted the importance of the specificity requirement, and even read in the *Miller* examples to constitutionally construe a federal statute. *Hamling v. United States*, 418 U.S. 87 (1974). Similarly, the Court reserved for state court construction the specificity of statutes comparable to Section 11-20 in *Miller* itself, and in the companion case of *Paris v. Adult Theatres I v. Slayton*, 413 U.S. 49 (1973). The relation of the specificity requirement to First Amendment protections was underscored again in *Jenkins v. Georgia*, 418 U.S. 153 (1974), in which Mr. Justice Rhenquist, speaking for a majority of the Court, held that the film Carnal Knowledge could not, constitutionally, be treated as obscene:

> "We . . . took pains in Miller to 'give a few plain examples of what a state could define for regulation under part (b) of the standard announced,' that is the requirement of patent offensiveness . . . While this did not purport to be an exhaustive catalogue of what juries might find patently offensive, it was certainly intended to fix substantive constitutional limitations, deriving from the First Amendment, on the type of material subject to such a determination. It would be wholly at odds with this aspect of Miller

> to uphold an obscenity conviction based on a defendant's depiction of a woman with a bare midriff, even though a properly charged jury unanimously agreed on a verdict of guilty." (Id. at pp. 160-1.) (Citations omitted). (Emphasis added).

In the context of the importance in *Miller* attached to specificity, the recent litigation concerning Section 11-20 must be reviewed. Section 11-20, in pertinent part, reads

> "(b) Obscene Defined.
>
> A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in the description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs." 38 Ill. Rev. Stats. §11-20.

No further definition of obscenity is contained in the statute or incorporated by reference. Prior to *Miller*, the Illinois Supreme Court found this definition to be constitutional, in an opinion authored by Justice Davis. *People v. Ridens*, 51 Ill. 2d 410, 282 N.E. 2d 691 (1972) (hereafter referred to as *"Ridens I"*). Subsequently, the United States Supreme Court granted certiorari, vacated the judgment, and remanded the cause for consideration in light of *Miller*. On remand, *People v. Ridens*, 59 Ill. 2d 362, 321 N.E. 2d 264 (1974) (*"Ridens II"*), the Illinois Supreme Court said:

> "We need not and do not attempt to analyze the changes from the three part Roth-Memoirs standard effected by the enunciation of the three part Miller standard. It suffices to, and we now construe section 11-20 of the Criminal Code to incorporate parts (a) and (b) of the Miller standard." 321 N.E. 2d 270.

The context of the quotation clearly indicates that the (a) and (b) referred to are of the tripartite scheme, rather than the two examples, a shortcoming which was pointed out by Justice Davis, who was now the lone dissenter. 321 N.E. 2d 276.[1]

An incorporation of the *Miller* tripartite standard cannot alone satisfy *Miller's* specificity requirement. *Miller* explicitly reserved for the states the specification itself. Not every state will seek to regulate all, or even the same subset of that material which can be constitutionally treated as obscene. Indeed, the Supreme Court of the United States expressly avoided demanding the use of its particular examples as a standard or proposed regulatory scheme. *Ridens II* might have explicitly included the *Miller* examples as its own, by construction, as did the Supreme Court in *Hamling*, but *Ridens II* did not. It remained after *Ridens II* for Section 11-20 to be amended either legislatively or by state judicial construction to supply the wanting specificity so that the nature of the possible obscene materials being regulated, and their distinction from protected materials, could be adequately defined. *That definition is as essential to law enforcement officials who are charged with carraying out the law, as it is to juries* like the one in *Jenkins v. Georgia*, who must apply the law to a set of facts.

On the three occasions in which the Illinois Supreme Court had to construe Section 11-20, it chose not to supply the needed specificity. In *People v. Gould*, 60 Ill. 2d 159, 324 N.E. 2d 412 (1975), the tripartite *Miller* standard, and the two possible examples were quoted, just as they were in *Ridens II*. Reference was made to *Ridens II* for the incorporation of the

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[1] Where the state court has supplied examples by construction, the specificity problem may be cured. See Miller v. California, 418 U.S. 915 (1974) (appeal dismissed for want of substantial federal question); accord, People v. Nissinoff, 43 Cal. App. 3d 1025, 118 Cal. Rptr. 457 (1975); People v. Enskat, 33 Cal. App. 3d 900, 908-10, 109 Cal. Reptr. 433, 438-39 (1973), cert. denied, 418 U.S. 937 (1974).

Miller tripartite standard, and Justice Davis, dissenting, incorporated by reference his prior dissent in *Ridens II*. In *People v. Hume*, 60 Ill. 2d 397, 327 N.E. 2d 329 (1975), specificity was not explicitly dealt with. Finally, in an unanimous[2] opinion filed the very day that oral argument was heard in this case, the Illinois Supreme Court clearly stated that no further specifying judicial construction of Section 11-20 is forthcoming:

> "The defendant now argues that the statute [§11-20] does not sufficiently define the type of conduct whose depiction is proscribed.
>
> "In People v. Ridens, 51 Ill. 2d 410 [Ridens I], we affirmed the convictions of defendants who had been found guilty of violating, *inter alia*, the Illinois obscenity statute by selling obscene publications. The United States Supreme Court subsequently remanded that case and directed to us to reconsider our decision in light of the principles announced in *Miller* and related decisions. (*Ridens v. Illinois*, 413 U.S. 912, 37 L.Ed. 2d 1030, 93 S.Ct. 1046.) This court again affirmed the convictions and found that the Illinois obscenity statute was constitutional. (People v. Ridens, 59 Ill. 2d 362 [Ridens II], *cert. denied*, 421 U.S. 993, 44 L.Ed. 2d 483, 95 S.Ct. 2000 (hereinafter referred to as Ridens II). It was held in Ridens II that the obscenity statute was sufficiently clear and that it adequately informed the public of the conduct whose depiction is proscribed. We noted that the statutory definition of obscenity statutes includes within the scope of the 'prurient interest' a 'shameful or morbid interest in nudity, sex, or excretion.' The defendant argues that we erred in Ridens II in our interpretation of *Miller* and that *Miller* requires obscenity statutes to be much more specific in defining the type of material which will be considered obscene. We

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[2] The late Justice Davis had previously ceased to sit on the Illinois Supreme Court.

see no reason to reconsider our decision in Ridens II. It is extremely difficult to define the term 'obscenity' with a fine degree of precision. *We again express our opinion* that Illinois statutory definition is sufficiently clear to withstand constitutional objections." People v. Ward, No. 47479, slip op. at p. 2 (Ill. Sup.Ct., filed May 14, 1976). (Emphasis added) (Explanation supplied).

The similarity between Section 11-20, and the California statute which was the subject of the *Miller* remand is inescapable:

"(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes beyond the customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance." Miller v. California; 413 U.S. 15, 17, 18, n.1 (1973).

This court does not believe *Miller* can be properly construed as allowing the actual language of Section 11-20 to be specific without the judicial engrafting of *Miller*-type examples, or other specifications such as those articulated in Justice Davis's dissent in *Ridens II*. As no such specification has been supplied by the Illinois Supreme Court, this court holds that Section 11-20, as construed, is constitutionally invalid.

Is Equitable Relief Appropriate on Behalf of the Individual Plaintiffs?

Defendants contend that under *Younger v. Harris*, 401 U.S. 37 (1971), the equitable relief requested by plaintiffs is barred by considerations of comity. As to all the individual plaintiffs, there is currently a pending criminal proceeding in the

Illinois state courts. Federal interference with those proceedings can be justified only if it can be shown that the proceedings are the product of bad faith on the part of law enforcement officials, or that other extraordinary circumstances exist.

The gravamen of bad faith prosecutions is the lack of a reasonable expectation that valid convictions will result. Section 11-20 has been repeatedly upheld by the Illinois Supreme Court. Good faith enforcement of such a statute cannot give rise to a bad faith prosecution. The complaint, as elucidated and limited by the Voluntary Bill of Particulars (see section I, "Facts Upon Which the Assertion of Official Bad Faith and Harassment Are Based") relies on: (1) the procedure to obtain warrants which authorize seizure of movies; (2) the seizure of items beyond the scope of a search warrant; (3) delay in filing charges based on material seized until after the commencement of the present lawsuit; (4) refusal to stipulate that items seized beyond the scope of the search warrants were illegally seized; (5) the use of allegedly illegally seized items for investigative purposes; (6) the filing of felony charges and request for felony bail bond for arrests under Section 11-20, whose violation is a misdemeanor; (7) failure to take into custody some persons who were arrested in the course of searches; and (8) statements made by defendants and their agents.

The relation of these assertions to bad faith harassment is attenuated since the adoption of alternative procedures by defendants appears to have avoided any recurrence. The statements attributed to defendants, or their alleged agents, are entirely consistent with good faith prosecution, albeit somewhat vigorous. Prosecutors have discretion to enforce state laws to the limit of their resources. No bad motive is attributable to the decision to enforce Section 11-20. Seizures beyond the scope of the warrant are generally unconstitutional, and defendants have not contended (with the exception of film projectors) that any justification exists for those seizures. Only the corporate defendant has rights with respect to these seizures, however.

The initial filing of felony charges and the request for felony bail bond on a Section 11-20 misdemeanor charge is the most promising candidate to support an ultimate finding of bad faith. It is, however, an isolated occurrence. The improprieties allegedly committed, with this one exception, are either wholly consistent with good faith prosecution, or else readily redressible in the proceedings which are now pending, insofar as the individual plaintiffs are concerned. These items may nonetheless have probative value toward establishing bad faith if future events supplement them. While the court does not implicitedly condone all of the practices alleged to have been carried out by defendants and their agents, we hold that the complaint, including the bill of particulars, does not make out a claim for the bad faith harassment exception as to the individual plaintiffs and that consequently, the complaint must be dismissed as to the individual plaintiffs for failure to state a claim on which relief can be granted.

The Property of Equitable Relief for Eagle Books

Having found that 38 Ill. Rev. Stats. § 11-20 is unconstitutional as construed, for failure to incorporate specific examples of obscenity, or to otherwise satisfy the specificity requirements of *Miller v. California, supra,* it remains for the court to consider what, if any, relief should be fashioned for Eagle Books, in light of this court's holding that no equitable relief is appropriate as to the individual plaintiffs. The comity considerations of *Younger v. Harris, supra,* however, ordinarily apply only when there is a pending criminal proceeding against the very plaintiff who seeks relief in federal court. Otherwise, declaratory and injunctive relief may be given on traditional grounds. *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *Steffel v. Thompson*, 415 U.S. 452 (1974). In this particular case, the court must engage in an analysis similar to one suited for determination of the existence of bad faith/extraordinary cir-

cumstances, in order to determine whether the corporate plaintiff, Eagle Books, should be treated for purposes of fashioning relief as though there in fact were a pending criminal proceeding against it.

Doran v. Salem Inc., supra, acknowledged the question of separating, for purposes of fashioning relief, plaintiffs in one lawsuit according to whether or not each had a pending criminal proceeding. Three corporations in a single town each operated bars. At those bars, they employed women with uncovered breasts. The town enacted an ordinance which made such employment a sufficient condition for the imposition of criminal punishment against the corporations in the form of a fine. On the effective date of the ordinance, the corporation ceased the practice, but jointly filed a complaint in federal district court to have the ordinance declared unconstitutional and to have its enforcement enjoined. The complaint requested a temporary restraining order which was denied. Subsequent to the denial, one of the three corporations temporarily resumed the practice, and became the subject of a criminal prosecution in the state court. In holding that each plaintiff must be treated separately, the court said:

> "We do not agree . . . that all three plaintiffs should automatically be thrown into the same hopper for Younger purposes and should thereby each be entitled to injunctive relief. We cannot accept that view, any more than we can accept petitioner's equally Procrustean view that because [plaintiff] M & L would have been barred from injunctive relief had it been the sole plaintiff, [plaintiffs] Salem and Tim-Rob should likewise be barred not only from injunctive relief but declaratory relief as well. *While there plainly may be some circumstances in which the legally distinct parties are so closely related that they should all be subject to the Younger considerations which govern any one of them, this is not*

> *such a case*—while respondents [plaintiffs] are represented by common counsel, and have similar business activities and problems, they are apparently unrelated in terms of ownership, control and management. We thus think that each of the individual respondents should be placed in the position required by our cases as if that respondent stood alone." Id. at pp. 928-9. (Explanation supplied.) (Emphasis added.)

It is apparent from this statement that the *Younger* considerations themselves are intertwined with the distinction between parties. The closer the relationship between parties, the more likely it is that the comity policies underlying *Younger* will be disrupted by federal equitable relief with respect to one when a pending criminal proceeding exists with respect to the other. In the present case, the nexus between Eagle Books and its plaintiff-employees is too substantial to allow for the categorical exclusion of consideration of comity allowed in *Steffel* and *Doran, supra*. Similarly, the differences in the interests of the corporate and the individual defendant are too substantial to utilize the same bad faith/extraordinary circumstances criteria as would apply if a pending criminal proceeding existed with respect to Eagle Books. Although no specific exception is arrived at, the court holds that under the circumstances of this case, declaratory and injunctive relief is appropriate on behalf of Eagle Books.

Eagle Books has interests in the enforcement and validity of Section 11-20 that do not equally pertain to its plaintiff-employees. First and foremost, Eagle Books operates bookstores at which, it has been conceded, communicative materials which are not obscene are kept and sold. The arrests, searches, and seizures all do great injury to Eagle Books' dissemination of these First Amendment materials. The bookstores must be closed down when arrests are made. Patrons are chilled from exercising their First Amendment rights by the presence of on-

going police procedures at the source of materials. And patrons of course have no access to these protected materials during the periods when the stores are closed. Moreover, the seizure of materials and cessation of protected activity give rise to a day to day pecuniary loss to Eagle Books, much of which cannot be calculated. Also, Eagle Books is subject to prosecution under Section 11-20. See 38 Ill. Rev. Stats. § 2-15. The decision not to so prosecute is presumably an exercise of that same prosecutorial discretion by which some employees might be arrested, but not others.

In contrast, the interest of the persons arrested is much more limited to the particular arrest. There is no allegation that they partake of their employer's loss of income. They have no institutional role as book and film dispensers. They do have an interest in being able to carry out their present employment, which appears to subject them to repeated risk of prosecution.

Perhaps the most important reason why these differences in interests do not, by themselves, justify separate treatment is what Eagle Books has *not* done, namely it has not refrained from activity which could give rise to prosecution under an arguably unconstitutional law for the purpose of testing it in federal court, as was the case of the plaintiffs who secured relief in *Steffel* and *Doran*. Eagle Books was the employer, and in a relevant sense the controller of its employees, who did violate that law. Eagle Books, therefore, has some vicarious involvement with the pending prosecutions, and it is therefore necessary to review the policies that support *Younger*.

Given the above conclusion, the court must now decide whether the circumstances of this case nonetheless justify, in terms of comity and federalism, equitable relief. Historically, federal courts have been unwilling to interfere with the state criminal system. In *Ex Parte Young*, 209 U.S. 123, 161-62 (1908), equitable relief was sanctioned against an attorney

general who enforced a state criminal law (by seeking a writ of mandamus) which had been found to carry so heavy a fine that citizens and corporations might be unwilling to challenge it for fear of being subject to the penalty for even one violation. In *Fenner v. Boykin*, 271 U.S. 240 (1926), the Supreme Court affirmed the denial of an injunction against the enforcement of a criminal statute:

> "The accused should first set up and rely upon his defense in the state courts even though this involves a challenge to the validity of some statute, unless, it appears that this course would not afford adequate protection." Id. at p. 244.

The injunction of state prosecutions was reserved for situations in which the "danger of irreparable loss is both great and immediate." Id. at p. 243. These cases turn on whether or not the available state court proceeding afforded a reasonable way to challenge the allegedly unconstitutional statutes.

The boundaries of restraint of federal equitable relief against state prosecutions were further delineated in *Douglas v. City of Jeannette*, 319 U.S. 157 (1943), in which the Supreme Court affirmed the reversal of an injunction against prosecuting under a statute which the Supreme Court that very day had declared unconstitutional. The rationale was that

> "It does not appear from the record that petitioners have been threatened with any injury other than that incident to every criminal proceeding brought lawfully and in good faith, or that *a federal court of equity by withdrawing the determination of guilt from the state courts could rightly afford petitioners any protection which they could not secure by prompt trial and appeal pursued to this Court.*" Id. at p. 164 (Emphasis added). Accord., Cameron v. Johnson, 390 U.S. 611, 620 (1968).

The nexus between good faith prosecutions and lack of irreparable injury sufficient for intervention was articulated in

Dombrowski v. Pfister, 380 U.S. 479 (1965). Prosecutions, arrests, searches and seizures had been allegedly undertaken, nominally pursuant to the Louisiana Subversive Activities and Communist Control Law, and the Communist Propaganda Control Law, with no expectation of valid convictions. Moreover, the items seized were allegedly used to harass those engaged in particular First Amendment activities. The Court held that the complaint stated a basis for equitable relief, even though there existed a pending prosecution against plaintiffs. The basis did not arise, however, from the prospect of mistake by the prosecutor.

> "It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this court and that the mere possibility of erroneous initial application of constitutional standards will not usually amount to the irreparable injury necessary to justify a disruption of orderly state proceedings." Id. at pp. 484-485.

It can be seen from these cases that the bad faith exception is treated as a special class (and the only class the Supreme Court has recently viewed) of the cases in which the state proceeding is peculiarly inadequate to vindicate rights guaranteed by the federal constitution. Drawing from the facts in *Dombrowski v. Pfister*, there are a number of reasons why bad faith prosecutions are such appropriate occasions for an exception to the general rule against federal interference.

First of all, where there is no expectation of a valid conviction, proceeding through the state system, and even the Supreme Court, will not stop the launching of another arrest or law suit. The pending proceeding only offers retrospective relief and is by definition unlikely to deter the unscrupulous law enforcement agent from future transgressions. Additionally, the consequences of the arrestee's entry into the state criminal justice system may be more honorous than usual, given the expectation of bad faith. Arrests may be attended with undue publicity,

for example, as was the case in *Dombrowski*, thereby resulting in an undue impairment of the First Amendment rights of the plaintiffs. More generally, the incidents to a good faith criminal prosecution are enhanced because systematic safeguards against their unjustified initiation, such as the prerequisite of probable cause for an arrest, can not be depended on. The entire social context of bad faith prosecutions must also be considered. A community, comprised mainly of those who are not the explicit victims of bad faith prosecutions, may change its behavior, particularly First Amendment exercise, because of the rash of arrests, even if those improperly motivated arrests are professionally executed, and even if no misuse of the fruits is involved. Finally, the extent of prosecutorial power is so great that its abuse[3] may have serious effect before a state proceeding ends.

The bad faith exception is harmonious with the *Younger v. Harris* recitation of a "national policy forbidding federal courts to stay or enjoin state court proceedings except under special circumstances" 401 U.S. at p. 41 (footnote omitted), with

> ". . . a sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States" Id. at p. 44,

and with a proper respect for state functions. However, matters which are quite capable of causing great and immediate irreparable harm are not always addressed in the pending state proceeding. Federal intervention in those instances cannot be characterized as a disregard for the competence of state court judges,

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[3] Where a statute itself is flagrantly unconstitutional, the same presumption of irreparability may overcome the ordinary deference to state proceedings, even though there is no reason why the state proceedings might not quickly and competently address federal constitutional claims. Younger v. Harris, 401 U.S. 37, 53-5 (1971).

or as a disregard for the overwhelming expectation that they will carry out their oaths to support the federal constitution. *See Huffman v. Pursue*, 420 U.S. 592, 611 (1975). Indeed, the bad faith exception is a recognition that where great and immediate irreparable harm will flow from continued prosecutions, and where the pending state court proceedings do not, by their nature, anticipate the injuries being done, federal courts must fulfill their role as the guarantors of the federal constitutional rights and must fashion appropriate relief. By definition, the injuries which inhere in a good faith prosecution are contemplated by the state court criminal proceeding. Also, where a different kind of state proceeding is involved, federal intervention might not be called for. *See Llewelyn v. Oakland County Prosecutor's Office*, 402 F.Supp. 1379, 1391 (E.D. Mich. 1975).

Given this context, we proceed to examine the facts before us to determine if the irreparability posed by the continued enforcement of Section 11-20 approaches that which has been associated with bad faith. In considering the following factors, it should be borne in mind that conditions which, by themselves, may not be sufficient to give rise to irreparable harm justifying intervention, may nonetheless be relevant to the ultimate assessment of whether the total situation presented to the court is sufficient to determine the question before it in favor of granting equitable relief. First Amendment interests are at stake in this lawsuit. The prospect of continued enforcement seriously interferes with the distribution of communicative materials. It is uncontested that defendants intend to vigorously enforce the statute. While such vigor is in no way tantamount to bad faith, it does indicate that the ability to continue the First Amendment activity may be increasingly, immediately and unjustifiably threatened.

In the ordinary situation, this court would give very careful deference to the prospect that the constitutional issue could be

raised before the state trial court. However, no real meaningful opportunity exists for such an issue to be raised there. As discussed earlier in this opinion, the Illinois Supreme Court has had four occasions in less than three years to review the very constitutional question raised by plaintiffs, the last occasion being on the same day that oral argument was held in this cause. Through those cases, that court has repeatedly indicated that it will not give any further specification of Section 11-20 through the judicial construction contemplated by *Miller v. California*, 411 U.S. 415 (1973). State trial courts are bound by their state Supreme Court, especially where the state Supreme Court has construed a ruling by the United States Supreme Court. Consequently, in light of the *People v. Ward, supra*, announcement that Section 11-20 is constitutionally specific, no Illinois trial court can be expected to give further consideration of the issue. Therefore, given the particular First Amendment aspects of this matter it is evident that a federal court, by precluding some part of this matter from the state court's consideration, gives petitioner Eagle Books protection it could not secure through a prompt trial and ultimate appeal to the Supreme Court. *Cf. Douglas v. City of Jeannette, supra*, at p. 164.

What confronts plaintiff Eagle Books is not that its chances of success on appeal are "inauspicious". *Huffman v. Pursue, supra*, at p. 1211, or that there exists the "mere possibility of erroneous initial application of constitutional law", *Dombrowski v. Pfister, supra*, at p. 485, but rather that there is no meaningful opportunity at all to raise its issue, which we find more than substantial, before the state court system if it were to be prosecuted.

The attack on this statute is in essence facial, although it includes not only the words written by the legislature, but also those engrafted by the Illinois Supreme Court. Because the same statute, as construed, applies to all state citizens who may engage in the First Amendment activity carried out by Eagle

Books and its counterparts, the federal interest is heightened. *Steffel v. Thompson*, 415 U.S. 452, 474 (1974). In addition we find the unconstitutionality of Section 11-20 invokes the prospect of the presumption of irreparability that would attend a flagrantly unconstitutional statute. While we do not find patent unconstitutionality to be encrusted on every part of the statute, it is noteworthy that, despite the directions of the remand of the original *Ridens* case, and despite the emphasis in *Miller* on specificity, the state has not explicitly confronted the specificity question either legislatively or judicially. The obviousness of the need for a specifying construction of Section 11-20 under *Miller* enhances the irreparability attendant to the lack of a meaningful opportunity to obtain proper construction through the state court system.

Aside from the factors of irreparability, the present case at the same time contains ingredients which soften ordinarily harsh impact on state-federal relations that attends federal intervention. The state court system has carefully considered the constitutional question raised by plaintiffs, and we respect the process by which they have achieved their result. The intervention of this court does not cast in a negative light the competence or fairness of state court judges; rather, once the state court has reflectively performed that function, no purpose, under present circumstances, is served by delaying federal consideration of the same issue through a three step process of trial, appeal, and subsequent appeal (by leave) to the Illinois Supreme Court. Moreover, the nature of the relief granted today by the court does not directly encumber any ongoing prosecution. *Cf. Hicks v. Miranda*, 420 U.S. 920 (1975).

Conclusion

There is no present criminal proceeding pending against plaintiff Eagle Books. It is therefore, unnecessary to decide whether the present circumstances give rise to the same level of

irreparability as is associated with a bad faith prosecution or "extraordinary" circumstances. We do find, however, that Eagle Books has shown, without contest, serious irreparable injury in the face of threatened enforcement of the statute which entails seizures of its materials and arrests of its employees. In view of the current state law, declaratory relief by itself would not seem to be adequate, *Cf. Ex Parte Young, supra*, since law enforcement persons have a duty to enforce Section 11-20. Accordingly, the court hereby declares that Section 11-20 is violative of the Fourteenth Amendment of the Constitution, and that defendants are hereafter enjoined from enforcing Section 11-20 as presently construed, on the premises of the two bookstores owned by Eagle Books and from prosecuting Eagle Books for violation of Section 11-20. Particularly, future arrests and seizures of materials pursuant to the present Section 11-20 can no longer be authorized or carried out with respect to those premises.

ENTER:

/s/ WALTER J. CUMMINGS
Judge
United States Court of Appeals

/s/ HUBERT L. WILL
Judge
United States District Court

/s/ JOEL M. FLAUM
Judge
United States District Court

DATED: May 28, 1976

Supreme Court, U. S.
FILED
FEB 16 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

In The

Supreme Court of the United States

—o—

October Term, 1976
No. 76-415

—o—

WESLEY WARD,

Appellant

vs.

STATE OF ILLINOIS,

Appellee.

—o—

ON APPEAL FROM THE ILLINOIS SUPREME COURT

—o—

Jurisdictional Statement Filed September 20, 1976.
Jurisdiction Noted January 10, 1977

COCKLE PRINTING CO., 1822 St. Mary's Ave., Omaha

APPENDIX

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CHRONOLOGICAL LIST OF RELEVANT ORDERS AND OTHER PROCEEDINGS

Proceedings in the Tenth Judicial Circuit
Peoria County, Illinois

Date	Proceedings
10/7/71	Complaint filed charging Defendant Wesley Ward with obscenity under Chapter 38, § 11-20, Illinois Revised Statutes.
Prior to trial	Defendant's Motion to Dismiss filed.
(Exact date not of record)	
Prior to trial	Motion to Dismiss denied.
3/23/72	Cause called for trial before Honorable John A. Whitney; State's evidence heard; People's Exhibits 1 and 2 admitted into evidence, namely "Bizarre World" and "Illustrated Case Histories: A Study of Sado-Masochism;" Defendant's Motion for Directed Judgment at the Close of the State's Case in Chief filed; cause taken under advisement.
4/4/72	Stipulation as to evidentiary matters on file; Order entered denying Defendant's Motion for Directed Judgment, convicting Defendant Wesley Ward of obscenity.
4/17/72	Hearing on aggravation and mitigation held; defendant sentenced to one day in jail and fined $200.00
5/8/72	Defendant's Motion for New Trial or, in the Alternative for Judgment of Acquittal filed.
5/23/72	Order entered denying Defendant's Motion for New Trial or, in the Alternative for Judgment of Acquittal.
5/30/72	Notice of Appeal to the Illinois Appellate Court, Third District, filed; Praecipe for Record filed.

Proceedings in the
Illinois Appellate Court, Third District

2/20/75 Appellate Court in written opinion affirms defendant's conviction.

Proceedings in the
Illinois Supreme Court

5/27/75 Order entered granting Defendant's Petition for Leave to Appeal.

5/14/76 Illinois Supreme Court in written opinion affirms defendant's conviction.

6/1/76 Defendant's Petition for Rehearing filed.

6/7/76 Supplement to Petition for Rehearing filed.

6/28/76 Order denying Defendant's Petition for Rehearing entered.

7/6/76 Order entered by Justice Howard Ryan staying mandate of Illinois Supreme Court pending review by the United States Supreme Court.

8/13/76 Defendant filed Notice of Appeal to United States Supreme Court, together with Notice of Filing.

PROCEEDINGS IN THE TENTH JUDICIAL CIRCUIT PEORIA COUNTY, ILLINOIS

[C-2] In the Circuit Court of the Tenth Judicial

Circuit of Illinois

Peoria County

Case No. 71 CM 3858

People of the State of Illinois,
Plaintiff,

vs.

Wesley Ward, alias John Doe,
501 SW Adams, Peoria, Ill.,
Defendant.
Age Over 21.

COMPLAINT

(Filed: October 7, 1971)

Officer Carl Tiarks, being first duly sworn, by way of complaint, states that on or about February 12, 1971, in the said County of Peoria and State of Illinois, at Wes Ward's Book Store, 501 SW Adams, Peoria, the offense of Obscenity in violation of Section 11-20 (a-1) of Chapter 38 of the Illinois Revised Statutes, was committed and that affiant has reasonable grounds to believe that Wesley Ward, alias John Doe, hereinafter called the defendant, then and there was guilty of committing the same, in that said defendant did wilfully and unlawfully offer for sale and did through an employee, Elmer Stockman, sell to officer Carl Tiarks two (2) obscene magazines entitled "Bizarre World," No. 1, published by Eros Publishing Co., Inc., Wilmington, Delaware, and "Illustrated Case Histories, a Study of Sado-Masochism," Vol. 3, No. 1, Published by Calga Publishers, Inc., Los Angeles, California, with knowledge of the nature or content thereof, said offense happened at Wes Ward's Book Store, 501 SW Adams St., in the City of Peoria, State of Illinois; con-

trary to the form of the Statute in such cases made and provided, and against the peace and dignity of the people of the State of Illinois and prays that the said defendant may be arrested and dealt with according to law.

Subscribed and sworn to before me:

/s/ Carl R. Tiarks
Affiant

John A. Whitney
Judge

Dated: September 28, 1971

[C-6] MOTION TO DISMISS COMPLAINT

(Filed: Prior to trial [exact date not of record])

Now Come the defendants, Elmer Stockman and Wesley Ward, by their attorney, Donald M. Reno, Jr. of Reno, O'Byrne & Kepley, and pray that this Court will dismiss the complaints and state and allege in support thereof:

1. That the complaint and Statute, Chapter 38, Section 11-20 (1) is so unconstitutionally vague, indefinite, and uncertain that a reasonable person could not ascertain the purpose and intent of the said Statute.

2. That Chapter 38, Section 11-20 (1), is unconstitutional for failing to provide an adversary hearing prior to the issuance of an arrest warrant.

3. That Chapter 38, Section 11-20 (1) is unconstitutional for failing to provide that contemporary community standards are to be established by reference to a national spectrum.

4. That Chapter 38, Section 11-20 (1) is unconstitutional for failing to incorporate the Constitutional tests for obscenity as dictated in *Redrup v. New York,* 386 U. S. 767, 87 S. Ct. 1414 (1967).

5. That Chapter 38, Section 11-20 (1) is unconstitutional for making it a prohibitive act to exhibit, [C-7] sell, print, or offer to sell, give away, circulate, publish, distribute or attempt to distribute any obscene book or magazine when such conduct is Constitutionally protected so long as the materials are not foisted upon an unwilling public, pandered, or sold to juveniles.

6. That Chapter 38, Section 11-20 (1) is unconstitutional for it does not reflect a legitimate interest in the sale, dissemination, and distribution of alleged obscene materials as defined in *United States v. Lethe,* 312 F. Supp. 421 (E. D. Cal., 1970), and *United States v. B & H Dist. Corp.,* 319 F. Supp. 1231 (W. D. Wis., 11/24/70), and *Hayse v. Van Hoomissen,* 321 F. Supp. 642 (D. Ore., 11/19/70).

7. That Chapter 38, Section 11-20 (1) is discriminatory in failing to permit the sale, distribution, and dissemina-

tion of alleged obscene materials to members of the public desiring to purchase the same.

8. That Chapter 38, Section 11-20 (1) is unconstitutional for failing to incorporate the element that the material in question must be "utterly without any redeeming social value" as held in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts,* 383 U. S. 415, 86 S. Ct. 975 (1966).

9. Chapter 38, Section 11-20 (e) is unconstitutional by providing that the possession of more than three copies of obscene material shall be *prima facie* evidence of an intent to disseminate.

10. That the complaints in question act as a chilling effect upon the defendants' First Amendment freedoms and violate their Constitutional rights pursuant to the Fourteenth Amendment, in that, similar publications are sold openly and publicly in metropolitan areas throughout the United States without being [C-8] subjected to criminal prosecution.

11. That the Court improperly concluded, as a matter of law, pursuant to the adversary hearing, that the publications in question would establish the presence of Constitutional obscenity.

12. That one or more of the preceding paragraphs constitutes violation of the defendants' First, Fifth, and Fourteenth Amendment freedoms as established under the United States Constitution.

Wherefore, the defendants, Elmer Stockman and Wesley Ward, pray that this Honorable Court will dismiss the complaints for one or more of the above reasons.

Elmer Stockman and Wesley Ward
Defendants

By: Donald M. Reno, Jr.
of: Reno, O'Byrne & Kepley
Their Attorney

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[1] **REPORT OF PROCEEDINGS**

(Filed: May 16, 1972)

Be it remembered that on Thursday, the 23rd day of March, A. D., 1972, the following proceedings came on to be heard before the Honorable John A. Whitney, Judge of said Court.

Appearances:

Dick Williams, Assistant State's Attorney, for the People.

Donald M. Reno, Jr., Attorney at Law, for the Defendant.

Martha Warren, C. S. R., Official Court Reporter, Court House, Peoria, Illinois.

[2] The Court: This is a hearing in connection with 71 CM 3858, being the People of the State of Illinois v. Wesley Ward and the People are represented by Mr. Dick Williams, assistant state's attorney and the defendant is represented by Mr. Donald M. Reno. Do you care to make a statement Mr. Williams?

Mr. Williams: Yes, sir, we are here pursuant to an order entered heretofore setting this matter down for hearing on the merits and another court has heard the various preliminary motions and I believe both of the parties in this case are willing to waive rehearing of these heretofore filed motions at this time?

The Court: Is that correct on behalf of the defendant?

Mr. Reno: It is your Honor. I would like the record to show that previously, we have filed motions in cases that were styled as 71 A 571, 71 A 572 and 71 A 573. There was a motion to dismiss the complaint in those cases. The motion, as I understand, was granted and the complaints were refiled as 71 CM 3858 and Mr. Williams has informed me he is going to advise the Circuit Clerk to add the pleadings which were in the 71 A 571 file to the file of 71 CM

3858 so that we will have a complete record here and Judge Coney previously has ruled on all our pending motions and the defense is satisfied that these motions have been disposed of in such a fashion that we are now at issue on the merits and that is what we are here today on pursuant to notice.

The Court: All right, sir. Is there anything gentle-[3] men in the way of opening statements which you want to make or are they waived?

Mr. Williams: Your Honor, this is an opening statement for the People. The people have only one witness and that will be officer Tjarks [sic] and I will introduce the magazines that he purchased from the Wes Ward's book store at 501 Southwest Adams, Peoria. We will introduce these magazines as exhibits then the court will be required to determine whether or not they are obscene as set out in the framework of the Statute. This is the nature of the case and the type of evidence the people will present.

Mr. Reno: We have no statement.

The Court: Thank you gentlemen. You may call your witness.

CARL TJARKS [sic],

called as a witness on behalf of the People, being first duly sworn by the Clerk of the Court, testified as follows, in answer to

Direct Examination, by Mr. Williams

Q. Will you tell the court your name?

A. Carl Tjarks [sic].

Q. And your occupation?

A. Police officer for the city of Peoria.

Q. And how long have you been so employed?

A. 8½ years.

Q. Were you on duty on February 12, 1971?

A. Yes.

Q. And did you have occasion that day to go to 501 Southwest Adams Street, City of Peoria, County of Peoria. State of Illinois?

A. Yes.

Q. What is at that location?

[4] A. Wes Ward's Book Store.

Q. This Book Store, is it designated the Wes Ward Book Store?

A. Yes.

Q. How is that done?

A. Through signs in the window and one over the front door.

Q. Are you acquainted with the owner of this particular establishment?

A. Yes.

Q. Do you know his name?

A. Yes.

Q. What is that name?

A. Wesley Ward.

Q. Have you had occasion to see him managing this store from time to time?

A. He and I have had conversations before.

Q. Has he told you he is the owner of this particular book store during any of these conversations?

A. I can't really remember the specific conversation where he said he was the owner.

Q. But you have seen him working and in fact running this book store, is that true?

A. Yes.

Q. When you went in there that day, what time of the day was it?

A. 1:30 in the afternoon.

Q. Did you have occasion to purchase two magazines at that time and place?

A. Yes, I did.

Mr. Williams: These exhibits have been marked [5] previously as people's exhibits. People's exhibits 1 and 2 during the hearing that was had in this matter and they were brought to that hearing by this officer. Could we continue to use these same exhibit numbers?

The Court: I don't see any reason why you cannot. I take it Mr. Reno has no objection?

Mr. Reno: No, sir.

The Court: Continue to use the markings previously placed on the books, taking them as being marked as exhibits for identification.

Q. I am going to hand you what has been marked for identification as People's exhibit 1 and ask you if you have seen this magazine before?

A. Yes, I have.

Q. Did you mark it?

A. Yes.

Q. When did you do this?

A. Immediately after exiting the store.

Q. Where did you get this particular magazine?

A. Inside the Wes Ward Book Store.

Q. How did you obtain it?

A. It was in a rack. Just picked it off the rack and took it up to the front register, paying the purchase price.

Q. Who sold this magazine to you?

A. An employee of the store. I can't remember his name right now.

Q. He was working there at the time?

A. Yes.

Q. Similarly I hand you what has been marked people's exhibit 2 for identification and ask you if you have seen that before?

[6] A. Yes, I have.

Q. Where did you see that the first time?

A. That was similarly on the rack in Wes Ward's Book Store.

Q. Did you purchase this at the same time and place?

A. Yes, both books were purchased at the same place.

Q. I am going to have the reporter mark this as exhibit three, being a sack. Have you seen this sack before?

A. Yes, sir, this is the sack the two books were placed in after the purchase was made at the front register.

Q. This was done in your presence?

A. Yes.

Q. And you are referring to People's exhibit 3 for identification?

A. Yes, I am.

Q. How is it stamped?

A. Wes Ward's Book Store, Franklin Street, Weses Stand, 501 Southwest Adams, Peoria, Illinois.

Mr. Williams: We would offer into evidence exhibit 3 for identification at this time.

Mr. Reno: We have no objection other than the same general objection that we raised in our motion to dismiss. That's all.

The Court: Shall we show that objection renewed at this time?

Mr. Reno: Yes, please.

Mr. Williams: We also offer plaintiff's exhibits 1 and 2 into evidence.

[7] Mr. Reno: And I would renew my objection previously made.

The Court: If you would show that the objection previously made is renewed and that the objection is denied, People's exhibits 1, 2 and 3 are hereby admitted as People's exhibits 1, 2 nd 3.

Q. Have you talked to Mr. Ward since this occasion?

A. Oh, yes.

Q. Did you talk about anything relating to his management of the book store at 501 Southwest Adams?

A. Yes.

Mr. Reno: I think I would have to object to the conversations between Mr. Ward and Mr. Tjarks [sic] on the grounds we made a motion to produce statements and we didn't receive any to my knowledge.

The Court: Do you have argument on that motion Mr. Williams?

Mr. Williams: None of the statements were reduced to writing in any form so the only argument would be since they weren't reduced to writing they wouldn't be in the nature of anything required to be produced.

Mr. Reno: We take opposition to any statements between Mr. Tjarks [sic] and Mr. Ward that were not produced, oral or otherwise and as further stated in our motion to produce, it is requested that they bring in any and all statements made by the defendant to any law enforcement officials or their agents. Our position would be without production of these statements, it would be improper

for Mr. Tjarks [sic] to testify to the same at this time. I believe the rules are that when [8] there is a motion to produce in this fashion, it is appropriate for the State to, in response to such a motion, reduce to a narrative form a conversation between the law enforcement officials and the defendant.

Mr. Williams: We will withdraw the question.

The Court: Show the question withdrawn.

Mr. Williams: No further questions.

The Court: Mr. Reno?

Cross-Examination, by Mr. Reno

Q. Officer Tjarks [sic] did you enter the store on the date in question in order to obtain evidence for a possible criminal prosecution?

A. Yes, sir.

Q. Are you acquainted with the general physical premises of the store?

A. Yes.

Q. In the course of your employment, have you had occasion to go by there in your squad car occasionally?

A. Yes.

Q. And observe the store?

A. Yes.

Q. Is it not true that the windows fronting the store are painted in such a fashion that passers by on Water Street cannot see into the actual store from the street?

A. Yes.

Q. On the date in question, did you see any children, by that I mean any persons under the age you believe to be 18, in the store at the time?

[9] A. No sir.

Q. Were the magazines in question enclosed in cellophane at the time of the purchase?

A. Yes, they were.

Q. You purchased the magazines in question from a Mr. — pardon me, from an employee that was in the store at the time?

A. That's correct.

Q. Mr. Ward was not present in the store at the time the magazines were purchased?

A. No.

Mr. Reno: No further questions.

The Court: Any redirect?

Mr. Williams: Nothing further. People rest.

The Court: You may step down. The state has rested Are there any motions at this time?

Mr. Reno: There are your Honor, we have a motion for directed judgment at the close of the State's case in chief, copy of the same and we are also handing to the court 11 Xerox copies of the cases which we are citing to the court.

(Further argument not included in this record as per Mr. Reno's letter of April 21, 1972.)

(Matter taken under advisement by Court until March 30, 1972 at 9:30 A.M.)

Which Were All the Proceedings Had in Said Matter on This Day.

MOTION FOR DIRECTED JUDGMENT AT THE CLOSE OF THE STATE'S CASE IN CHIEF

(Presented to the court: March 23, 1972)

Now Come the defendants, Elmer Stockman and Wesley Ward, by their attorney, Donald M. Reno, Jr. of Reno, O'Byrne & Kepley, and pray that this Court will enter judgment for the defendants, and allege and state in support thereof:

1. That the State has wholly and totally failed to present a scintilla of evidence bearing upon the presence of the Constitutional test and elements of obscenity as defined in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts,* 383 U.S. 415, 86 S. Ct. 975 (1966), to-wit: (1) that the publications appeal to the prurient interest of the average adult, (2) that the materials are patently offensive, in that they substantially exceed contemporary community standards in the representation of sexual conduct, and (3) that the materials are utterly void of any redeeming social value.

The failure of the State to establish a *prima facie* case by the introduction of affirmative testimony relating to the three Constitutional elements defining obscenity, as a matter of law, entitles the defendants to a directed judgment as more fully set forth and argued in the following cases:

U. S. A. v. Groner, — F. 2d — (5th Cir., 1/11/72);

U.S. v. Klaw, 350 F. 2d 155, 157, 160, 165, 166, 167, 168, 170 (2d Cir., 1965);

In Re 7 Magazines, 268 A. 2d 707, 712, 713 (S. Ct. R. I., 1970);

City of Phoenix v. Fine, 4 Ariz. App. 303, 420 P. 2d 26, 28, 30 (1966);

Keuper v. Wilson, 111 N. J. Super. 489 268 A 2d 753 (1970);

Duggan v. Guild Theatre, 436 Pa. 191, 258 A. 2d 858 (S. Ct. Pa., 1969);

Ramirez v. State of Oklahoma, 430 P. 2d 826, 827-829 (1967);

United States v. 37 Photographs, Cv. No. 69-2242-F, U. S. D. C. of Cent. Dist. Cal. (10/5/71);

Dunne v. Maryland State Board of Censors, 240 Md. 249, 213 A. 2d 751 (1965);

House v. Commonwealth of Virginia, 210 Va. 121, 169 S. E. 2d 572, 576 (S. Ct. Va., 1969);

Pinkus v. Pitchess, 429 F. 2d 416 (9th Cir., 1970).

That it was a violation of the defendants' due process for this court to infer that a *prima facie* case has been established without evidence of the defendants' guilt. (*Thompson v. City of Louisville*, 362 U. S. 199, 206, 80 S. Ct. 624, 629 (1960).)

2. That the State has wholly and totally failed to establish a *prima facie* case that the defendants had knowledge of the contents of the publications. Knowledge must be established as a matter of law. (*Smith v. California*, 361 U. S. 147, 80 S. Ct. 215 (1959).)

3. That as a matter of law the publications in issue are Constitutionally protected when viewed in the perspective of *Redrup v. New York*, 386 U. S. 767, 87 S. Ct. 1414 (1967), and its progeny.

4. That Chapter 38, Section 11-20 (1) is unconstitutional for making it a prohibitive act to exhibit, sell, print, or offer to sell, give away, circulate, publish, distribute or attempt to distribute any obscene book or magazine when such conduct is Constitutionally protected so long as the materials are not foisted upon an unwilling public, pandered, or sold to juveniles.

6. That Chapter 38, Section 11-20 (1) is unconstitutional for it does not reflect a legitimate interest in the

sale, dissemination, and distribution of alleged obscene materials as defined in *United States v. Lethe*, 312 F. Supp. 421 (E. D. Cal., 1970), and *United States v. B & H Dist. Corp.*, 319 F. Supp. 1231 (W. D. Wis., 11/24/70), and *Hayse v. Van Hoomissen*, 321 F. Supp. 642 (D. Ore., 11/19/70).

7. That Chapter 38, Section 11-20 (1) is unconstitutional for failing to incorporate the element that the material in question must be "utterly without any redeeming social value" as held in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*, 383 U. S. 415, 86 S. Ct. 975 (1966).

8. That Chapter 38, Section 11-20 (1) is unconstitutional for failing to incorporate the Constitutional tests for obscenity as dictated in *Redrup v. New York*, 386 U. S. 767, 87 S. Ct. 1414 (1967).

9. That the complaint and Statute, Chapter 38, Section 11-20 (1) is so unconstitutionally vague, indefinite, and uncertain that a reasonable person could not ascertain the purpose and intent of the said Statute.

Wherefore, the defendants, Elmer Stockman and Wesley Ward, pray that this Honorable Court will enter judgment of acquittal for the defendants and against the People for one or more of the above reasons.

Elmer Stockman and Wesley Ward
By: Donald M. Reno, Jr.
Their Attorney

[C-21] STIPULATION

(Filed: April 4, 1972)

Now comes Wesley Ward by his attorney, Donald Reno, Jr., and the People by Dick L. Williams, Assistant State's Attorney, and stipulates as follows:

That Wesley Ward is the active owner of the Wesley Ward Bookstore at 501 S. W. Adams Street, Peoria, Illinois.

That Wesley Ward was actively participating in the management of the Wes Ward Bookstore on February 12, 1971.

That Wesley Ward was responsible for and supervised purchasing, inventory control and sales of the Wes Ward Bookstore, 501 S. W. Adams Street, Peoria, Illinois, on February 12, 1971.

Dick L. Williams
Assistant State's Attorney
Donald Reno, Jr.

[C-22] JUDGMENT OF TRIAL COURT AND DENIAL OF MOTION FOR DIRECTED JUDGMENT, ETC.

Order

(Filed: April 4, 1972)

The Court having heard arguments on the Motion for Directed Judgment in the closing of the State's evidence the Court does hereby deny a judgment of acquittal. The Court further finds that the Defendant Wesley Ward be and is hereby convicted of the offense of obscenity as set forth in the complaint number 71CM-3858.

This matter is hereby set down for a hearing of aggravation and mitigation of the offense and sentencing on April 13, 1972 at 2:00 P. M.

/s/ John A. Whitney
Judge of the Tenth Judicial Circuit

[C-23] **ORDER**

(Filed: April 17, 1972)

Now on this 17th day of April, 1972, come the People of the State of Illinois, by Dick L. Williams, Assistant State's Attorney, Peoria County, Illinois, and also comes the defendant in his own person accompanied by his attorney, Mr. Donald M. Reno, Jr.

A hearing in aggravation and mitigation was held, neither party submitted any formal evidence.

The defendant is hereby sentenced to one (1) day in the Peoria County Jail and fined $200.00 and costs.

/s/ John A. Whitney

Judge John Whitney
Associate Judge

[C-24] **MOTION FOR NEW TRIAL OR IN THE ALTERNATIVE MOTION FOR JUDGMENT OF ACQUITTAL**

(Filed: May 8, 1972)

Now Comes the defendant, Wesley Ward, by his attorney, Donald M. Reno, Jr. of Reno, O'Byrne & Kepley, and prays that this Court will enter judgment of acquittal for the defendant, or in the alternative, grant a new trial, and alleges and states in support thereof:

1. That the State has not proven the defendant's guilt beyond a reasonable doubt.

2. That the State wholly and totally failed to present a scintilla of evidence bearing upon the presence of the Constitutional test and elements of obscenity as defined in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*, 383 U. S. 415, 86 S. Ct. 975 (1966), to-wit: (1) that the publications appeal to the prarient interest of the average adult, (2) that the materials are patently offensive, in that they substantially exceed contemporary community standards in the representation of sexual conduct, and (3) that the materials are utterly void of any redeeming social value.

The failure of the State to Establish a *prima facie* [C-25] case by the introduction of affirmative testimony relating to the three Constitutional elements defining obscenity, as a matter of law, entitles the defendant to a directed judgment as more fully set forth and argued in the following cases:

U. S. A. v. Groner, — F. 2d — (5th Cir., 1/11/72);

U. S. v. Klaw, 350 F. 2d 155, 157, 160, 165, 166, 167, 168, 170 (2d Cir., 1965);

In Re 7 Magazines, 268 A. 2d 707, 712, 713 (S. Ct. R. I., 1970);

City of Phoenix v. Fine, 4 Ariz. App. 303, 420 P. 2d 26, 28, 30 (1966);

Keuper v. Wilson, 111 N. J. Super. 489, 268 A. 2d 753 (1970);

Duggan v. Guild Theatre, 436 Pa. 191, 258 A. 2d 858 (S. Ct. Pa. 1969);

Ramirez v. State of Oklahoma, 430 P. 2d 826, 827 829 (1967);

United States v. 37 Photographs, Cv. No. 69-2242-F, U. S. D. C. of Cent. Dist. Cal. (10/5/71);

Dunn v. Maryland State Board of Censors, 240 Md. 249, 213 A. 2d 751 (1965);

House v. Commonwealth of Virginia, 210 Va. 121, 169 S. E. 2d 572, 576 (S. Ct. Va., 1969);

Pinkus v. Pitchess, 429 F. 2d 416 (9th Cir., 1970).

That it was a violation of the defendant's due process for this court to infer that a *prima facie* case had been established without evidence of the defendant's guilt *(Thompson v. City of Louisville*, 362 U. S. 199, 206, 80 S. Ct. 624, 629 (1960)).

2. [sic] That the State has wholly and totally failed to establish a *prima facie* case that the defendant had *knowledge* of the contents of the publications. Knowledge must be established as a matter of law. *(Smith v. California*, 361 U. S. 147, 80 S. Ct. 215 (1959).)

[C-26] 3. That as a matter of law the publications in issue are Constitutionally protected when viewed in the perspective of *Redrup v. New York*, 386 U. S. 767, 87 S. Ct. 1414 (1967), and its progeny.

4. That Chapter 38, Section 11-20 (1) is unconstitutional for making it a prohibitive act to exhibit, sell, print, or offer to sell, give away, circulate, publish, distribute or attempt to distribute any obscene book or magazine when such conduct is Constitutionally protected so long as the materials are not foisted upon an unwilling public, pandered, or sold to juveniles.

5. That Chapter 38, Section 11-20 (1) is unconstitutional for it does not reflect a legitimate interest in the sale, dissemination, and distribution of alleged obscene materials as defined in *United States v. Lethe*, 312 F. Supp. 421 (E. D. Cal., 1970) and *United States v. B & H Dist. Corp.*, 319 F. Supp. 1231 (W. D. Wis., 11/24/70) and *Hayse v. Van Hoomissen*, 321 F. Supp. 642 (D. Ore., 11/19/70).

6. That Chapter 38, Section 11-20 (1) is unconstitutional for failing to incorporate the element that the material in question must be "utterly without any redeeming social value" as held in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*, 383 U. S. 415, 86 S. Ct. 975 (1966).

7. That Chapter 38, Section 11-20 (1) is unconstitutional for failing to incorporate the Constitutional tests for obscenity as dictated in *Redrup v. New York*, 386 U. S. 767, 87 S. Ct. 1414 (1967).

8. That the complaint and statute, Chapter 38, Section 11-20 (1) is so unconstitutionally vague, indefinite, and uncertain that a reasonable person could not ascertain the purpose and intent of the said statute. [C-27] Wherefore, the defendant, Wesley Ward, prays that this Honorable Court will enter a judgment of acquittal for the defendant or in the alternative grant a new trial.

Wesley Ward, Defendant

By: Donald M. Reno, Jr.
His Attorney

[C-28] ORDER

(Filed: May 23, 1972)

The Court having considered arguments of counsel on the defendant's Motion for New Trial or in the Alternative Motion for Judgment of Acquittal does hereby deny said Motions.

Defendant is required to file notice of appeal within 30 days or by June 23, 1972.

/s/ Judge John Whitney

NOTICE OF APPEAL

(Filed: May 30, 1972)

[C-29] An appeal is taken from the order and judgment described below.

1. Court to which appeal is taken: Illinois Appellate Court, Third District.

2. Name of Appellant and addess to which notice shall be sent:

Name: Wesley Ward

Address: 501 Southwest Adams, Peoria, Illinois 61601

3. Name and address of Appellant's attorney on appeal:

Name: Donald M. Reno, Jr.

Address: Reno, O'Byrne & Kepley, 501 West Church Street, Champaign, Illinois 61820

4. Date of Judgment: April 4, 1972.

5. Offense of which convicted: Chapter 38, Section 11-20—sale of obscene materials.

6. Sentence: Entered on April 17, 1972, one day in jail and $200 fine.

7. Denial of Post-trial Motion—order entered May 23, 1972.

Wesley Ward
Defendant

By: Donald M. Reno, Jr.
His Attorney

[C-31] PRAECIPE FOR RECORD

(Filed: May 30, 1972)

To the Clerk of the Circuit Court of Peoria County:

You are hereby directed to make up the record in the above-entitled case for transmittal to the Appellate Court of Illinois, Third District, said record to contain the following:

1. Complaint.

2. Motion to dismiss complaint.

3. Motion for directed judgment at the close of the State's case in chief.

4. Stipulation between Attorney Donald Reno, Jr. and Dick L. Williams.

5. Motion for new trial or in the alternative motion for judgment of acquittal and order denying same.

6. Order of sentence and fine.

7. Notice of Appeal.

8. Praecipe for record.

9. Any and all written orders and docket entries by the court.

10. The transcript of the proceedings.

[C-32] 11. The exhibits entered into evidence by the court. (The Magazines, "Illustrated Case Histories—A Study of Sado-Masochism," Vol. 3, No. 1, and "Bizarre World," No. 1.)

Donald M. Reno, Jr.

Attorney for Defendant-Appellant

PROCEEDINGS IN THE ILLINOIS APPELLATE COURT, THIRD DISTRICT

Appeal from the Circuit Court of the
Tenth Judicial Circuit, Peoria County, Illinois.

(Filed: February 20, 1975)

Mr. JUSTICE STOUDER delivered the opinion of the court:

This is an appeal from the judgment of the circuit court of Peoria County finding Defendant, Wesley Ward, guilty of violating Illinois Revised Statutes, 1971, ch. 38, par. 11-20 (a) (1) by selling two obscene publications. Defendant waived a jury and after bench trial was found guilty and sentenced to one day in jail and fined $200. The only witness for the State was the complaining police officer who testified he purchased the two publications, "Bizarre World" and "Illustrated Case Histories, a Study of Sado-Masochism", at defendant's store. The police officer's testimony and the magazines themselves were the sole evidence presented by the State. Defendant presented no evidence and after his motion for judgment was denied judgment was entered against the defendant.

There are three principal issues on this appeal. The resolution of each of these is governed by the case of *People v. Ridens*, 51 Ill. 2d 410, 282 N. E. 2d 691 which was granted certiorari by the U. S. Supreme Court in 413 U. S. 912, 37 L. Ed. 2d 1030, 93 S. Ct. 3046. The Supreme Court vacated the judgment and remanded the case to the Illinois Supreme Court, — Ill. 2d — (March, 1974, Docket Nos. 43974, 44449 cons.) which affirmed the convictions of the defendant. The United States Supreme Court in vacating and remanding the initial decision in the *Ridens* case directed the Illinois Supreme Court to reconsider the case in light of the holdings of the United States Supreme Court in *Miller v. California*, 413 U. S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607, and other related cases decided by the Court at the same time. After reconsideration of the *Ridens* case the Illinois Supreme Court reaffirmed the defendant's

conviction and concluded the Illinois Obscenity Statute (Ill. Rev. Stat. 1969, ch. 38, par. 11-20) complied with the standards announced in the United States Supreme Court cases.

The first issue is whether the State's evidence consisting of magazines made up almost exclusively of photographs constituted sufficient proof to establish violation of the obscenity statute and therefore, whether the failure to present opinion testimony as to contemporary community standards was fatal to the State's case. The Illinois Supreme Court in *People v. Ridens*, 51 Ill. 2d 410, 282 N. E. 2d 691 held such opinion testimony was not required. The court there held the publications themselves constituted sufficient evidence to support defendant's conviction for violating the statute.

The second issue is whether it was necessary for the State to prove either the sale to minors or the intrusion upon the privacy of unwilling adults in order to convict defendant of violating the statute by selling the magazines. The court in *People v. Ridens*, 51 Ill. 2d 410, 282 N. E. 2d 691 held defendant's claim that the obscenity ordinance and code were deficient because they did not require proof that the offending publications were sold to minors or intruded upon the privacy of unwilling adults was without merit. In accord with this case we hold here that it was not necessary for the State to prove either the sale to minors or the intrusion upon the privacy of unwilling adults.

The final issue on this appeal is whether the two publications were obscene as a matter of law. Again, the case of *People v. Ridens*, 51 Ill. 2d 410, 282 N. E. 2d 691 is dispositive of the issue in the case at bar. The magazines in this case do not differ in any substantial sense from the magazines described in *Ridens* and they fall within that category prohibited by the statute. See also, *People v. Gould*, — Ill. 2d — (September, 1974 Docket Nos. 42652, 42662 cons.)

For the foregoing reasons the judgment of the circuit court of Peoria County is affirmed.

Judgment affirmed.

Dixon, J. and Scott, P. J. concur.

(Supreme Court Seal)

State of Illinois

Office of

CLERK OF THE SUPREME COURT

Springfield

62706

Clell L. Woods
Clerk

May 27, 1975

Telephone
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Mr. J. Steven Beckett
Reno, O'Byrne & Kepley
Attorneys at Law

501 West Church Street
Champaign, Illinois 61820

No. 47479—People State of Illinois, respondent, vs. Wesley Ward, petitioner. Leave to appeal, Appellate Court, Third District.

You are hereby notified that the Supreme Court today *allowed* the petition for leave to appeal in the above entitled cause.

Very truly yours,

Clell L. Woods,
Clerk of the Supreme Court

PROCEEDINGS IN THE
ILLINOIS SUPREME COURT

(Filed: May 14, 1976)

Docket No. 47479—Agenda 4—March, 1976.

THE PEOPLE OF THE
STATE OF ILLINOIS, Appellee,

vs. WESLEY WARD, Appellant.

MR. JUSTICE CREBS delivered the opinion of the court:

The defendant was convicted of the offense of obscenity after a bench trial in the circuit court of Peoria County. The court ruled that the defendant, the operator of a book store, had violated Section 11-20 (a) (1) of the Criminal Code of 1961 (Ill. Rev. Stat. 1971, ch. 38, par. 11-20 (a) (1)) by selling two obscene publications. The defendant was sentenced to spend one day in the county jail and was fined $200 and costs.

The defendant presented no evidence in his own behalf at trial but did file a motion for a directed verdict at the close of the State's case. After this motion was denied and a judgment of conviction was entered, the defendant filed a post-trial motion in which he alleged, *inter alia*, that the obscenity statute was unconstitutional and that the magazines in question were constitutionally protected. The post-trial motion was denied, and the defendant's conviction was subsequently affirmed. *(People v. Ward*, 25 Ill. App. 3d 1045.) We have granted the defendant's petition for leave to appeal to this court.

The defendant first contends that the Illinois obscenity statute is unconstitutional in that it does not specifically define the type of sexual conduct that may not be depicted. The defendant relies on the case of *Miller v. California*, 413 U. S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607, in which the United States Supreme Court announced new criteria to be used in judging the constitutionality of obscenity statutes. The court determined that the three questions

to be considered in such a case are: "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest [citations]; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." The Supreme Court stated that the conduct whose depiction is proscribed by obscenity statutes must be "specifically defined by the applicable state law, as written or authoritatively constructed." 413 U. S. 15, 24, 37 L. Ed. 2d 419, 430-31, 93 S. Ct. 2607, 2615.

The Illinois obscenity statute states in pertinent part:

"(a) Elements of the Offense.

A person commits obscenity when, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, he:

(1) Sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene;

• • •

(b) Obscene Defined.

A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs." (Ill. Rev. Stat. 1971, ch. 38, par. 11-20.)

The defendant now argues that the statute does not sufficiently define the type of conduct whose depiction is proscribed.

In *People v. Ridens,* 51 Ill. 2d 410, we affirmed the convictions of defendants who had been found guilty of violating, *inter alia,* the Illinois obscenity statute by selling obscene publications. The United States Supreme Court subsequently remanded that case and directed us to reconsider our decision in light of the principles announced in *Miller* and related decisions. *(Ridens v. Illinois,* 413 U. S. 912, 37 L. Ed. 2d 1030, 93 S. Ct. 3046.) This court again affirmed the convictions and found that the Illinois obscenity statute was constitutional. *(People v. Ridens,* 59 Ill. 2d 362, *cert. denied,* 421 U. S. 993, 44 L. Ed. 2d 483, 95 S. Ct. 2000 (hereinafter referred to as Ridens II).) It was held in Ridens II that the obscenity statute was sufficiently clear and that it adequately informed the public of the conduct whose depiction is proscribed. We noted that the statutory definition of obscenity includes within the scope of the "prurient interest" a "shameful or morbid interest in nudity, sex or excretion." The defendant argues that we erred in Ridens II in our interpretation of *Miller* and that *Miller* requires obscenity statutes to be much more specific in defining the type of material which will be considered obscene. We see no reason to reconsider our decision in Ridens II. It is extremely difficult to define the term "obscenity" with a fine degree of precision. We again express our opinion that Illinois' statutory definition is sufficiently clear to withstand constitutional objections.

The defendant also contends that the obscenity statute is unconstitutional as applied to him because the State elicited no evidence suggesting that the publications in question were forced upon unwilling audiences or made available to juveniles. The defendant argues that the statute cannot be constitutionally applied to cases in which the sexually explicit materials are sold or distributed only to consenting adults. This argument is based on the allegation that contemporary community standards are not offended unless the obscene materials are forced upon unwilling audiences or made available to minors.

The defendant's argument is without merit. Contemporary community standards are relevant in determining whether a publication is obscene but bear no relevance to the questions of how or to whom obscene materials may be distributed. If a publication is determined to be obscene, it is not entitled to constitutional protection. *(Miller v. California,* 413 U. S. 15, 23, 37 L. Ed. 2d 419, 430, 93 S. Ct. 2607, 2614.) The Illinois General Assembly chose to make the commercial distribution of obscene materials a crime. This was within the police power of the State. The sale of obscene publications is a violation of the criminal law, therefore, even if the publications are not forced upon unwilling audiences or made available to minors.

The final contention made by the defendant is that the two publications are not obscene and thus are entitled to protection under the first amendment to the United States Constitution and Article I, Section 4, of the Illinois Constitution. In obscenity cases, a reviewing court must make an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected. *(People v. Ridens,* 59 Ill. 2d 362.) After reviewing the publications at issue in this case, we have no hesitation in affirming the holding of the lower courts that the materials are in fact obscene. We find that the average person applying contemporary community standards would consider that, taken as a whole, the sole appeal of the two publications is to the prurient interest and that the dominant theme of the magazines is a morbid interest in nudity and sex. Moreover, we regard the publications as depicting, in a patently offensive way, sexual conduct defined by the obscenity statute, as authoritatively construed in Ridens II. In addition, the magazines go substantially beyond customary limits of candor in such depiction. We also find that the magazines have no literary or artistic merit and that they are utterly without redeeming social value. For the foregoing reasons we hold that the two publications are obscene, and the judgment of the appellate court is affirmed.

Judgment affirmed

PETITION FOR REHEARING

(Filed: June 1, 1976)

The defendant-appellee, Wesley Ward, prays that this Court would grant his petition for rehearing, and would reverse its judgment affirming his conviction. In support of his petition for rehearing, the defendant-appellant states as follows:

The Illinois Supreme Court erroneously failed to find unconstitutional the Illinois Obscenity Statute, Chapter 38, § 11-20 for failure to meet the specificity requirements of *Miller v. California,* 413 U. S. 15, 93 S. Ct. 2607 (1973). The Illinois Supreme Court has had multiple opportunities to meet the guidelines of *Miller,* if a proper judicial construction were permissible, and has failed to do so.

This very issue is currently pending in a Federal Court in the Northern District of Illinois, in a cause styled *Eagle Books, Inc., et al. v. Philip Reinhard, et al.,* No. 76-C-20014. This matter involves the convening of a three-judge Federal court to pass on the validity of the Illinois Obscenity Statute, as construed by this Court in *People v. Ridens,* 59 Ill. 2d 362, 321 N. E. 2d 264 (1974). Federal District Judge Joel Flaum, in passing on the plaintiffs' contentions with regard to the Illinois Obscenity Statute, found that a substantial federal question had been presented and ordered the convening of a three-judge court on April 15, 1976. A copy of his memorandum opinion convening said court is attached to this petition for rehearing.

On May 14, 1976, oral arguments were presented to Seventh Circuit Court of Appeals Circuit Justice Walter Cummins and Federal District Judges Joel Flaum and Hubert Will, in Federal District in Chicago. That court is also aware of the opinion announced in this pending case on May 14, 1976, and a decision is currently pending in the Federal case.

On these facts and authority, it is submitted that the Illinois Supreme Court should reconsider its views con

cerning the Illinois Obscenity Statute, holding the same unconstitutional and reversing the defendant's conviction. In addition, it is submitted that the materials in question could not be held obscene under any of the guidelines previously announced by the Illinois Supreme Court.

For these reasons, the defendant prays that the Court would grant its petition for rehearing and would reverse his conviction in this case.

Respectfully submitted,

WESLEY WARD, Defendant-Appellant

BY: J. STEVEN BECKETT

/s/ J. Steven Beckett

RENO, O'BYRNE & KEPLEY

501 West Church
Champaign, Illinois

Attorneys for Defendant-Appellant

(Memorandum opinion of Joel M. Flaum, Federal District Judge, in *Eagle Books, Inc., et al. v. Philip Reinhard, et al.,* No. 76-C-20014, omitted in printing.)

SUPPLEMENT TO PETITION FOR REHEARING

(Filed: June 7, 1976)

The defendant-appellant, Wesley Ward, supplements his Petition for Rehearing previously filed in this Court by providing this Court the opinion of the United States District Court for the Northern District of Illinois, Western Division, in *Eagle Books, Inc., et al. v. Reinhard, et al.*, No. 76-C-20014. This opinion holds unconstitutional the Illinois Obscenity Statute, Chapter 38, § 11-20 as written and as construed by this Court in *People v. Ridens* (Ridens II), 59 Ill. 2d 362, 321 N. E. 2d 264 (1974), for failing to meet the specificity requirements of *Miller v. California* 413 U. S. 15, 93 S. Ct. 2607 (1973).

The defendant-appellant respectfully submits that this opinion is persuasive authority to grant a rehearing, reverse defendant's conviction, and hold the Illinois Obscenity Statute unconstitutional.

Respectfully submitted,

/s/ J. Steven Beckett

RENO, O'BYRNE & KEPLEY

Attorney for Defendant-Appellant

(Opinion of three-judge court in *Eagle Books, Inc., et al. v. Reinhard, et al.*, No. 76-C-20014, now reported at 418 F. Supp. 345, omitted in printing.)

(Supreme Court Seal)

STATE OF ILLINOIS

Office of

CLERK OF THE SUPREME COURT

Springfield

62706

June 28, 1976

Clell L. Woods
Clerk

Telephone
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Mr. J. Steven Beckett
Reno, O'Byrne & Kepley
Attorneys at Law

501 West Church Street
Champaign, Illinois 61820

No. 47479—People State of Illinois, appellee, vs. Wesley Ward, appellant. Appeal, Appellate Court, Third District.

You are hereby notified that the Supreme Court today denied the petition for rehearing in the above entitled cause.

Very truly yours,

/s/ Clell L. Woods

Clerk of the Supreme Court

ORDER

(Filed: July 6, 1976)

IT IS HEREBY ORDERED that the mandate in the above-captioned cause be stayed pending review by the United States Supreme Court until further order of this Court.

ENTERED this — day of ——, 1976. (no date on record)

/s/ Justice Howard C. Ryan

NOTICE OF FILING

(Filed: August 13, 1976)

TO: Raymond McKoski
Assistant Attorney General
State of Illinois

188 West Randolph, Suite 2200
Chicago, Illinois 60601

PLEASE TAKE NOTICE that on August 12, 1976, I have filed, by mailing, with the Clerk of the Illinois Supreme Court, a copy of the attached Notice of Appeal.

J. STEVEN BECKETT
RENO, O'BYRNE & KEPLEY

501 West Church
Champaign, Illinois

/s/ J. Steven Beckett

Attorney for defendant-appellant

NOTICE OF APPEAL

(Filed: August 13, 1976)

Notice is hereby given that Wesley Ward, defendant-appellant in the above captioned-cause, appeals to the Supreme Court of the United States from an opinion dated May 14, 1976, entered by the Supreme Court of the State of Illinois, and from the order of the said Supreme Court of the State of Illinois, dated June 28, 1976, denying the Petition for Rehearing filed by the defendant-appellant. Said opinion of the Illinois Supreme Court upheld the constitutionality of Illinois Revised Statutes (1976), Chapter 38, § 11-20, and held certain materials unprotected by the Constitution of the United States, which materials the defendant was convicted of distributing. Defendant-appellant takes this appeal pursuant to 28 U. S. C. 1257 (2).

Respectfully submitted,

/s/ J. Steven Beckett
Reno, O'Byrne & Kepley
501 West Church
Champaign, Illinois 61820

Attorney for Defendant-Appellant

REQUEST FOR CERTIFICATION OF RECORD

(Filed: August 13, 1976)

TO: Clell L. Woods, Clerk
Illinois Supreme Court

Supreme Court Building
Springfield, Illinois

Pursuant to United States Supreme Court Rule 12, the defendant-appellant, WESLEY WARD, requests that you certify the entire record of proceedings in this cause to provide for its transmission to the United States Supreme Court on or before September 26, 1976. Specifically, you are asked to certify the publications at issue in this cause, namely: "Bizarre World" and "Illustrated Case Histories, a Study of Sado-Masochism" for transmission to the United States Supreme Court on or before the afore-mentioned date.

The defendant-appellant shall notify you when his appeal has been docketed in the United States Supreme Court to provide for transmission of the record in this cause.

WESLEY WARD, Defendant-Appellant

BY: J. STEVEN BECKETT
RENO, O'BYRNE & KEPLEY

501 West Church
Champaign, Illinois

/s/ J. Steven Beckett

His Attorneys

Supreme Court, U. S.
FILED
DEC 9 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-415

WESLEY WARD,

Appellant,

vs.

STATE OF ILLINOIS,

Appellee.

On Appeal From The Supreme Court Of Illinois

MOTION TO DISMISS OR AFFIRM

WILLIAM J. SCOTT,
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Printed by Authority of the State of Illinois—12-7-76—50

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-415

WESLEY WARD,

Appellant,

vs.

STATE OF ILLINOIS,

Appellee.

On Appeal From The Supreme Court Of Illinois

MOTION TO DISMISS OR AFFIRM

Appellee moves to dismiss or affirm the judgment of the Supreme Court of the State of Illinois, pursuant to Rule 16(1)(b) and (1)(c) of the Rules of this Court.

STATEMENT OF THE CASE

The pertinent facts in the instant cause are fully stated in the opinion by the Supreme Court of Illinois and are adequately summarized in Appellant's Jurisdictional Statement. Where necessary, further factual references will be made in the course of argument.

ARGUMENT

I.

THE ILLINOIS OBSCENITY STATUTE, CHAPTER 38, SECTION 11-20, ILLINOIS REVISED STATUTES, MEETS THE SPECIFICITY REQUIREMENT ANNOUNCED IN MILLER v. CALIFORNIA, 413 U.S. 15 (1973).

A.

The Illinois Obscenity Statute As Construed By The Illinois Supreme Court Prior To The Miller Decision, Adequately Defines The Kinds Of Sexual Portrayals That Are Regulated.

This Court's now well known examples of language a state statute could employ to meet the *Miller* specificity requirement are:

> "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." 93 S. Ct. at 2613.

The Illinois Statute presently under attack does delineate the forms of sexual conduct that are subject to regulation. Chapter 38, Section 11-20 states in pertinent part:

> (b) Obscene Defined.
>
> A thing is obscene if, considered as a whole, its predominate appeal is to prurient interest, that is, a shameful or morbid interest in *nudity, sex* or *excretion,* and if it goes substantially beyond customary limits of

> candor in description or representation of such matters . . . (emphasis added).

Prior to *Miller,* the Illinois Supreme Court had occasion to further define the type of sexual portrayals covered by the statute. *People* v. *Sikora,* 32 Ill. 2d 260 (1965) held that descriptions of intercourse, oral-genital contact, masturbation, self-fondling, rape, lesbian intercourse, cunnilingus, flagellation and lesbian foreplay may be found obscene under the statute. Exhibition of the genitals is also subject to regulation but only when such exhibition can be described as lewd or predominately appealing to prurient interests. See, *City of Geraci,* 46 Ill. 2d 576 (1970); *People* v. *Biocic,* 224 N.E. 2d 572 (Ill. App. 1967); (nudity without lewdness is not obscene); *People* v. *Ridens,* 51 Ill. 2d 501 (1972). Representations of normal and abnormal sexual conduct are proscribed. *City* v. *Geraci,* 46 Ill. 2d 576, 582 (1970). Of course only "patently offensive" representations are subject to control. *People* v. *DeVilbiss,* 41 Ill. 2d 135, 141 (1968); *Chicago* v. *Universal Pub. and Dis. Corp.,* 34 Ill. 2d 250 (1966). It becomes apparent that the Illinois Obscenity Statute as construed prior to *Miller* virtually parallels the regulatory language suggested by the *Miller* court. Indeed, the Illinois statute as construed is more detailed than the suggested language of *Miller* in describing the forms of sexual conduct that may be found obscene. It is submitted that Chapter 38, section 11-20 as construed prior to *Miller* sufficiently describes the kinds of specific sexual conduct which can be found obscene and therefore complies with the specificity standard of *Miller.*

B.

Even Assuming That The Construction Placed On The Illinois Obscenity Statute By The Illinois Supreme Court Prior To Miller Was Insufficient To Meet The Miller Specificity Standard, Such Specificity Has Been Incorporated Into The Statute By The Illinois Supreme Court In Its Decisions Subsequent To Miller.

In *Miller*, this court stressed the fact that needed specificity could be added to obscenity statutes through judicial construction by state courts of last resort. 413 U.S. at pp. 25, 26, 28 and Note 6. Judicial construction of obscenity statutes to bring them into line with *Miller* was accomplished or approved by this Court in *Hamling* v. *U.S.*, 418 U.S. 87 (1974), and *Miller* v. *California II*, 418 U.S. 915 (the second appeal of the *Miller* case, after the California courts had construed and upheld their statute following this Court's remand in *Miller I*).

Accordingly, since the *Miller* decision, the Illinois Supreme Court has three times construed the Illinois Obscenity statute.

In *People* v. *Ridens II*, 59 Ill. 2d 362, 321 N.E.2d 264 (1974) the Court sought to read the *Miller* formulae into the statute. In their lengthy *Ridens II* Opinion, the Illinois Supreme Court quoted the operative passages of *Miller* pp. 24-26 in their entirety including the examples of obscenity, and then said: "It suffices to, and we now construe §11-20 of the Criminal Code and the Moline obscenity ordinance to incorporate parts (a) and (b) of the *Miller* standards." 59 Ill. 2d at 371; *cert. den.*, 421 U.S. 993.

Appellants herein contend that *Ridens II* does not specifically refer back and give specific incorporation to the

examples of what a state statute could define for regulation found in *Miller*, and therefore the statutory construction is deficient. Such a contention ignores the plain language of *Ridens II*, cited above and the obscenity decisions of the Illinois Supreme Court after *Ridens II*.

In *People* v. *Gould*, 60 Ill. 2d 159, 324 N.E.2d 412 (1975) the Illinois Court analyzed its position *vis-a-vis Miller*:

> "In *Miller* v. *California*, the Supreme Court in describing the constitutional guidelines for the regulation of obscene material said . . .:
>
> > "• • • State statutes designed to regulate obscene materials must be carefully limited. As a result, we now confine the permissible scope of such regulations to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.
> >
> > The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, (c) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. • • •
> >
> > We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of

what a state statute could define for regulation under part (b) of the standard announced in this opinion, supra:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.'

At the direction of the Supreme Court of the United States, in *People* v. *Ridens*, 59 Ill.2d 362, 321 N.E.2d 264 (hereafter Ridens II), we consider further, in light of *Miller*, our earlier judgment in *People* v. *Ridens*, 51 Ill.2d 410, 282 N.E.2d 691 (Ridens I). We held in Ridens II that our obscenity statute (Ill. Rev. Stat. 1969, ch. 38, par. 11-20) remained unconstitutional, we construed our statute to incorporate parts of guidelines (a) and (b) of the *Miller* standards (*which are set out in the above quotation from Miller*) and stated that under our statute the third question or guideline which must be considered in determining whether the matter or work is obscene is whether it is 'utterly without redeeming social value.' We explained that the more restrictive guideline (c), or part (c), of the *Miller* standard, *i.e.*, whether 'the work, taken as a whole, lacks serious literary, artistic, political, or scientific value' cannot be used. See Ridens II."

People v. *Gould*, 324 N.E.2d at 414-15, (emphasis added) (citations omitted).

The Illinois Supreme Court's reprinting of all the operative *Miller* passages and reincorporation of the guidelines "which are set out in the above quotation" clearly demonstrate that this Court's specific examples of obscenity were read into the Illinois obscenity statute in *Ridens II* and *Gould*.

The same general technique employed by the Supreme Court of Illinois to incorporate the *Miller* examples of prohibited obscenity into ch. 38, §11-20 was used by this Court to save a federal obscenity statute in *Hamling* v. *U.S.*, 418 U.S. 87 (1974). The *Hamling* decision did not in so many words repeat and adopt *Miller's* list of obscene types of materials. It simply stated:

"As noted above, we indicated in *U.S.* v. *12 200-ft. Reels of Film*, supra, 413 U.S. at 130 n.7, 93 S.Ct. at 2670, that we were prepared to construe the generic terms in 18 U.S.C. 1462 to be limited to the sort of 'patently offensive representations or descriptions of that specific "hard core" sexual conduct given as examples in *Miller* v. *California*.' We now so construe the companion provision in 18 U.S.C. 1461, the substantive statute under which this prosecution was brought. As so construed, we do not believe that petitioner's attack on the statute as unconstitutionally vague can be sustained." 418 U.S. at 115.

This is essentially what the Illinois Supreme Court said in *Ridens II* and *Gould, supra*, when it reprinted the governing portions of *Miller*, including the examples, and then construed ch. 38, §11-20 to include those requirements. Therefore, the method of incorporation used by the Illinois Court was effective and proper, and it precludes a successful attack on the statute's constitutionality.

II.

THE PUBLICATIONS INVOLVED IN THE INSTANT CASE ARE NOT PROTECTED BY THE FIRST AMENDMENT SINCE THEY ARE OBSCENE.

Two publications are involved in the instant case, "Illustrated Case Histories, A Study of Sado-Masochism," Vol. 3, No. 1, and "Bizarre World, Number One."

"Illustrated Case Histories, A Study of Sado-Masochism," consists of black and white and color photographs portraying nude males and females engaged in seductive embraces, posed so as to focus attention on their genitals. Sexual activity is suggested and imminent in most of the photographs. The models have their hands and mouths close to, or touching each others genitals, suggesting abnormal sexual activity. Chains, ropes, whips, cigarettes, scissors, etc., are portrayed in the photographs in connection with such sexual activities. Captions are included with many of the pictures extolling the virtues of sex accompanied by physical torture.

"Bizarre World, Number One," consists of black and white and color photographs of partially clothed and naked males and females. Some of the pictures suggest that sexual activity is imminent. (See "Bizarre World, Number One" at pp. 34, 70). Many of the photographs focus on the genitals of the models, and in some, whips are shown against the male genitals. Using whips, ropes, high heeled shoes, nets, male and female models, captions and articles, the magazine attempts to advance the cause of sex accompanied by torture.

The magazines involved herein, appeal to a shameful and morbid interest in nudity and sex and are therefore obscene.

CONCLUSION

For the foregoing reasons, the Court should dismiss the appeal in this case or affirm the judgment of the Illinois Supreme Court.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,

JAMES B. ZAGEL,
Assistant Attorney General,
188 West Randolph Street, Suite 2200,
Chicago, Illinois 60601,
(312) 793-2570,

Attorneys for Appellee.

December 7, 1976

Supreme Court, U. S.
FILED
DEC 29 1976
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1976

No. 76-415

WESLEY WARD,

Appellant,

vs.

STATE OF ILLINOIS,

Appellee.

On Appeal from the Supreme Court for the State of Illinois

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

Appellant submits this brief in opposition to the statement and argument of the State of Illinois presented in appellee's Motion to Dismiss or Affirm.

STATEMENT OF THE CASE

The facts of this case, together with the opinion of the Illinois Supreme Court are set forth in appellant's Jurisdictional Statement.

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ARGUMENT

The Illinois Supreme Court refused to accept the argument that Illinois decisions prior to Miller v. California had provided the constitutionally mandated authoritative construction.

The first argument of the State of Illinois is not a new one. Simply stated, it is that prior decisions of Illinois courts supply the clarifying gloss required by *Miller v. California*, 413 U. S. 15 (1973). The identical argument was made before the Illinois Supreme Court in *People v. Ridens*, 59 Ill. 2d 362, 321 N. E. 2d 264 (1974), (hereinafter referred to as *Ridens II*) and was acknowledged by that Court in its opinion, *Ridens II*, 59 Ill. 2d at 366, 321 N. E. 2d at 266. The Illinois Supreme Court did not accept this argument in *Ridens II*, instead the court elected to construe the Illinois Obscenity Statute, Chapter 38, § 11-20. The court held that it accepted parts (a) and (b) of the *Miller* tripartite test, and that the Illinois Obscenity Statute as written met those standards. *Ridens II*, 59 Ill. 2d at 373, 321 N. E. 2d at 270. This construction was restated in the opinion of the Illinois Supreme Court in appellant's case, *People v. Ward*, 63 Ill. 2d 437, 441, 349

N. E. 2d 47, 49 (1976), and is an important ingredient in the constitutional issue raised in this case. The Attorney General's argument, in fact, was explicitly rejected by Justice Davis in his dissent in *Ridens II*, 59 Ill. 2d 362, 378, 321 N. E. 2d 264, 272 (1974).

Appellee's argument is further weakened by an analysis of the cases cited therein. The opinions in those cases clearly demonstrate that no construction is being placed on any statute, rather in keeping with the independent judicial review required by *Jacobellis v. Ohio*, 378 U. S. 184 (1966), the Illinois Supreme Court was summarizing and reviewing the content of various publications on an ad hoc basis. *People v. Sikora*, 32 Ill. 2d 260, 267-269, 204 N. E. 2d 768, 772, 773 (1965); *Chicago v. Universal Pub. & Dist. Corp.*, 34 Ill. 2d 250, 252-257, 215 N. E. 2d 251, 252, 254 (1966); *City of Blue Island v. DeVilbiss*, 41 Ill. 2d 135, 140-142, 242 N. E. 2d 761, 763-765 (1968); *City of Chicago v. Geraci*, 46 Ill. 2d 576, 578-584, 264 N. E. 2d 153, 155-158 (1970). A close review of the cases leads only to the conclusion that the Illinois Supreme Court was attempting to interpret decisions of the United States Supreme Court which had also reviewed materials on an ad hoc basis. [e. g. *Sunshine Book Co. v. Summerfield*, 355 U. S. 372 (1958); *Manual Enterprises, Inc. v. Day*, 370 U. S. 478 (1962); *Central Magazine Sales, Ltd. v. United States*, 389 U. S. 50 (1967); *Potomac News Co. v. United States*, 389 U. S. 47 (1967); *Redrup v. New York*, 386 U. S. 767 (1967); *Rosenbloom v. Virginia*, 388 U. S. 450 (1967), and *Felton v. City of Pensacola*, 390 U. S. 340 (1968).]

In *People v. Ridens*, 51 Ill. 2d 410, 282 N. E. 2d 691 (1972) (*Ridens I*), certain materials with described con-

tent are found to be obscene, while in *City of Chicago v. Geraci*, 46 Ill. 2d 576, 264 N. E. 2d 153 (1970), similar content in publications is held to be constitutionally protected. The cases are, therefore, limited in application to the specific titled materials mentioned therein. Indeed, three cases cited by the Attorney General involve the review of alleged violations of city ordinances, and provide no authority with respect to a construction of the state obscenity statute, since it is not even drawn in issue by such cases. *Chicago v. Universal Pub. & Dist. Corp.*, 34 Ill. 2d 250, 215 N. E. 2d 251 (1966); *City of Blue Island v. DeVilbiss*, 41 Ill. 2d 135, 242 N. E. 2d 761 (1968); *City of Chicago v. Geraci*, 46 Ill. 2d 576, 264 N. E. 2d 153 (1970).

The Illinois Supreme Court has not engrafted the Miller v. California examples for specificity onto the Illinois obscenity statute.

The appellee contends that the Illinois Supreme Court in *Ridens II* and *People v. Gould*, 60 Ill. 2d 159, 324 N. E. 2d 412 (1975), accepted the examples of specific sexual conduct the depiction of which could lead to a finding of obscenity as set forth in *Miller v. California*. The Illinois Supreme Court in *Ridens II* and in *People v. Gould* stated that while the court accepted the first two parts of the *Miller* tripartite test, that is, parts (a) and (b), the Illinois Supreme Court felt that the statute as written met those standards. The opinions in *Ridens II* and *Gould*, therefore, demonstrate that the Illinois Supreme Court never addressed itself to the need for specificity, as exemplified in the examples of *Miller*.

Indeed, the opinion in *Ridens II* shows that the court never embraced the examples in *Miller*, and was instead directing its attention to (a) and (b) of the tripartite guidelines. The court summarized its holding in *Ridens II* in this manner:

> "Our holding that section 11-20 of the Criminal Code and the Moline obscenity ordinance are construed to incorporate parts (a) and (b) of the *Miller* rather than the *Memoirs* standards may not be applied retroactively if to do so renders their construction less favorable to defendants. (*People v. Patton*, 57 Ill. 2d 43, 48.) In our opinion the changes do not have that effect, and we find no impediment to the retroactive application of the statute and ordinance as now construed."
>
> *People v. Ridens*, 59 Ill. 2d at 374, 375-321 N. E. 2d at 270, 271.

In *Eagle Books, Inc. v. Reinhard*, 418 F. Supp. 345 (three-judge, N. D. Ill., 1976), a federal three-judge court held the Illinois Obscenity Statute unconstitutional for failing to set forth, post-*Miller*, the specific sexual conduct required under the *Miller* standards. That court stated:

> "An incorporation of the *Miller* tripartite standard cannot alone satisfy *Miller's* specificity requirement. *Miller* explicity reserved for the states the specification itself. Not every state will seek to regulate all, or even the same subset of that material which can be constitutionally treated as obscene. Indeed, the Supreme Court of the United States expressly avoided demanding the use of its particular examples as a standard or proposed regulatory scheme. *Ridens II* might have explicitly included the *Miller* examples as its own, by construction, as did the Supreme Court in *Hamling*, but *Ridens II* did not. It remained after *Ridens II* for section 11-20 to be amended either legislatively or by state judicial construction to supply the

wanting specificity so that the nature of the possible obscene materials being regulated, and their distinction from protected materials, could be adequately defined. *That definition is as essential to law enforcement officials who are charged with carrying out the law, as it is to juries* like the one in *Jenkins,* who must apply the law to a set of facts.

"On the three other occasions in which the Illinois Supreme Court had to construe sections 11-20, it chose not to supply the needed specificity. In *People v. Gould,* 60 Ill. 2d 159, 324 N. E. 2d 412 (1975), the tripartite *Miller* standard, and the two possible examples were quoted, just as they were in *Ridens II.* Reference was made to *Ridens II* for the incorporation of the *Miller* tripartite standard, and Justice Davis, dissenting, incorporated by reference his prior dissent in *Ridens II.* In *People v. Hume,* 60 Ill. 2d 397, 327 N. E. 2d 329 (1975), specificity was not explicitly dealt with."

Eagle Books v. Reinhard, 418 F. Supp. at 349, 350. (Court's emphasis.)

The opinion in *Eagle Books* went on to contradict the argument that the Illinois Supreme Court had provided specificity in the Illinois Obscenity Statute with the language of the Illinois Supreme Court's opinion in *People v. Ward,* 63 Ill. 2d 437, 349 N. E. 2d 47 (1976). In the opinion below, the Illinois Supreme Court stated:

> "It was held in *Ridens II* that the obscenity statute was sufficiently clear and that it adequately informed the public of the conduct whose depiction is proscribed. We noted that the statutory definition of obscenity includes within the scope of the 'prurient interest' a 'shameful or morbid interest in nudity, sex or excretion.' The defendant argues that we erred in *Ridens II* in our interpretation of *Miller* and that *Miller* requires obscenity statutes to be much more specific in defining the type of material which will be considered obscene. We see no reason to reconsider our decision in *Ridens II.* It is extremely difficult to define the term 'obscenity' with a fine degree of precision. We again express our opinion that Illinois' statutory definition is sufficiently clear to withstand constitutional objection."
>
> *People v. Ward,* 63 Ill. 2d at 441, 349 N. E. 2d at 49.

This opinion is not the type of specific judicial delineation that *Miller* specificity is directed to (see for example, *State v. Harding,* 114 N. H. 335, 320 A. 2d 646 [1974]) nor is it at all comparable with the *Miller* examples.

CONCLUSION

Considering all of the post-*Miller* opinions of the Illinois Supreme Court, it remains evident that that court feels the general terms employed by the Illinois Obscenity Statute satisfy *Miller's* requirements. The court's opinion below in the instant case leads only to the conclusion that no specificity has been provided nor can it be expected in the future. The Federal Court in *Eagle Books, Inc.* realized the serious impact on freedom of expression and the dissemination of protected material by the statute in its present form in Illinois, and accordingly held the statute unconstitutional. This Court should likewise hold that the Illinois Obscenity Statute, as written and as construed by the Illinois Supreme Court, is violative of the constitutional standards pronounced in *Miller v. California.*

Appellant submits the motion to dismiss or affirm this appeal should be denied.

Respectfully submitted,

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BRIEF FOR APPELLANT

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OPINIONS BELOW

The opinion of the Appellate Court for the Third District of the State of Illinois was announced on February 20, 1975. It is reported at 25 Ill. App. 3d 1045, 324 N. E. 2d 205 (1975). A copy of this opinion is included in the printed Appendix at A. 27, 28.

The opinion of the Supreme Court of the State of Illinois was announced on May 14, 1976. It is reported at 63 Ill. 2d 437, 349 N. E. 2d 47 (1976). A copy of this opinion is included in the printed Appendix at A. 31-33.

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JURISDICTION

In the proceedings below, the defendant, Wesley Ward, attacked the Illinois Obscenity Statute, Chapter 38, § 11-20, Illinois Revised Statutes, as being repugnant to the First and Fourteenth Amendments to the Constitution of the United States. The Illinois Supreme Court specifically addressed itself to this issue and decided in favor of the validity of the statute. Jurisdiction of this issue is conferred by Title 28, United States Code, § 1257(2). *Cohen v. California,* 403 U. S. 15, 17, 18 (1971), (reh. denied, 404 U. S. 876 [1971]). *Dahnke-Walker Mining Company v. Bondurant,* 257 U. S. 282, 287-290 (1921).

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QUESTIONS PRESENTED

1. Whether the Illinois Obscenity Statute, Chapter 38, § 11-20, Illinois Revised Statutes, as written and as construed by the Illinois Supreme Court, in light of the First Amendment standards announced by the United States Supreme Court in *Miller v. California,* 413 U. S. 15 (1973), is vague, indefinite, and uncertain, in violation of the free speech and press, and due process provisions of the First and Fourteenth Amendments to the Constitution of the United States.

2. Whether the publication "Bizarre World" and "Illustrated Case Histories, a Study of Sado-Masochism," upon which defendant's conviction rests, are protected material under the First Amendment to the Constitution of the United States.

—o—

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent provisions of the First and Fourteenth Amendments to the Constitution of the United States and the provisions of the Illinois Obscenity Statute, Chapter 38, § 11-20, Illinois Revised Statutes, at the time of the commission of the alleged offense appear in Appendix A to this brief.

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STATEMENT

On October 7, 1971, a single count complaint was filed in the Circuit Court of the Tenth Judicial Circuit, Peoria County, Illinois, charging the defendant, Wesley Ward, with violation of the state obscenity statute, Chapter 38, § 11-20, (a) (1), Illinois Revised Statutes. The complaint alleged that the defendant, through an employee, Elmer Stockman, had sold to the complainant, Officer Carl Tiarks, two obscene magazines, "Bizarre World", No. 1, and "Illustrated Case Histories, a Study of Sado-Masochism," Vol. 3, No. 1, at his bookstore in Peoria, Illinois (A. 3, 4).

The defendant filed his motion to dismiss, which alleged, *inter alia,* that Chapter 38, § 11-20 was unconstitutionally vague, indefinite and uncertain, and that the publications which were the subject of the obscenity charge were constitutionally protected (A. 5, 6). This motion was denied prior to trial (A. 7, 8).

The matter came for a hearing on the merits before the Honorable John A. Whitney, Associate Judge of the Peoria County Circuit Court, on March 23, 1972 (A. 7). The evidence adduced by the State was presented through the testimony of Carl Tiarks, the arresting officer. He stated that on February 12, 1971, he went into Wes Ward's Book Store located at 501 Southwest Adams Street, Peoria, Illinois at 1:30 in the afternoon (A. 9). At that time he purchased from an employee two magazines which he picked off a book rack. He paid the purchase price at the front register (A. 10, 11). The two magazines, as well as the sack in which they were placed after their purchase, were introduced into evidence (A. 10, 11).

On cross-examination Officer Tiarks testified that he entered the store on the date in question to obtain evidence for a possible criminal prosecution (A. 13). He further stated he was aware of the general physical premises of the store and had been by there in his squad car occasionally (A. 13). He had observed that the windows of the store were painted so that passersby could not see into the store from the street (A. 13). He also testified that on the date on which he purchased the publications he saw no persons under the age of 18 in the store at any time (A. 13). He indicated that the magazines he obtained were enclosed in cellophane at the time of the purchase

and that he purchased the magazines from an employee of the store, stating that the defendant Wesley Ward was not present in the store at the time (A. 14).

The State rested. The defendant presented a Motion for Directed Judgment at the Close of the State's Case in Chief (A. 14), which alleged *inter alia* that the state obscenity statute was unconstitutional and that the publications involved in the trial were entitled to constitutional protection (A. 15-17). The matter was taken under advisement (A. 14).

On April 4, 1972, the defendant's attorney and the assistant state's attorney stipulated that the defendant, Wesley Ward, was the active owner of the Wesley Ward Book Store, actively participated in the management of the store on February 12, 1971, and was responsible for and supervised purchasing, inventory control, and sales of the store (A. 18).

On April 4, 1972, Judge Whitney entered his order denying the defendant's motion for directed judgment of acquittal. Further, he convicted the defendant of the offense of obscenity as set forth in the complaint (A. 19).

On April 17, 1972, Judge Whitney sentenced the defendant to serve one day in the Peoria County Jail and fined him $200 and court costs (A. 20).

On May 8, 1972, the defendant filed a Motion for a new Trial or in the Alternative Motion for Judgment of Acquittal, alleging *inter alia* the unconstitutionality of the Illinois Obscenity Statute, Chapter 38, § 11-20, Illinois Revised Statutes, and that the publications in issue were constitutionally protected as a matter of law (A. 21-23).

This motion was denied by written order of Judge Whitney on May 23, 1972 (A. 24). Thereafter, the defendant filed his Notice of Appeal and Præcipe for Record to take an appeal to the Illinois Appellate Court, Third District (A. 25, 26).

The Illinois Appellate Court affirmed the defendant's conviction on February 20, 1975, in a written opinion (A. 27, 28). The defendant filed a Petition for Leave to Appeal to the Illinois Supreme Court which was allowed on May 27, 1975 (A. 29).

The Illinois Supreme Court, in a unanimous written opinion authored by Justice Crebs, affirmed the defendant's conviction on May 14, 1976. In that opinion the court rejected the defendant's contention that the Illinois Obscenity Statute was unconstitutional for failure to meet the standards of specificity set forth in *Miller v. California*, 413 U. S. 15 (1973). The court also held that the publications in issue were not entitled to constitutional protection (A. 30-33).

In his petition for rehearing, filed on June 1, 1976, the defendant called the Illinois Supreme Court's attention to the fact that a three-judge federal court had been convened in the Northern District of Illinois in a cause entitled *Eagle Books, Inc. et al. v. Philip Reinhard et al.*, to consider the validity of the Illinois Obscenity Statute as previously construed by the Illinois Supreme Court. The memorandum opinion of Federal District Judge Joel Flaum was presented to the court as authority for granting defendant's petition for rehearing (A. 34, 35). On June 7, 1976, the defendant supplemented his petition for

rehearing by presenting to the court the decision in *Eagle Books, Inc. et al. v. Reinhard et al.* (now reported at 418 F. Supp. 345), which opinion held unconstitutional the Illinois Obscenity Statute for failing to meet the specificity requirements of *Miller v. California*, 413 U. S. 15. The defendant asserted this was persuasive authority to grant rehearing, reverse his conviction, and hold the state obscenity statute invalid (A. 36). The court on June 28, 1976, denied the defendant's petition for rehearing (A. 37).

The mandate of the Illinois Supreme Court was stayed pending review of the case by the United States Supreme Court (A. 38). The defendant filed his Notice of Appeal to this Court on August 13, 1976, together with a Notice of Filing and Request for Certification of the Record (A. 39-41).

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SUMMARY OF ARGUMENT

1. In *Miller v. California*, 413 U. S. 15 (1973), this Court announced First Amendment standards under which states could regulate hard core sexually explicit obscene material. One of those standards, part (b) of *Miller*, requires that a state law, as written or authoritatively construed, give specific delineation of physical conduct, the description or representation of which, in material, may render it potentially obscene.

2. Since the decision in *Miller v. California*, many states have had the opportunity to review their obscenity statutes under the *Miller* principles. This has come about

both as a result of court action and legislative action. These courts have interpreted *Miller v. California* to allow a saving authoritative construction on a pre-existing obscenity statute where that state's prior decisions had already indicated the limitations on the statute's coverage. See for example, *People v. Enskat*, 33 Cal. App. 3d 900, 109 Cal. Rptr. 433 (1973); *Pierce v. State of Alabama*, 292 Ala. 473, 296 So. 2d 218 (1974); and *West v. State*, 514 S. W. 2d 433 (Tex. Ct. Crim. App., 1974).

Other states have ascertained that their prior decisions did not put limits on the type of material that could be proscribed under their obscenity statute. However, these courts adopted a specifying construction on their obscenity statute, giving it prospective effect only. *State v. Harding*, 114 N. H. 335, 320 A. 2d 646 (1974); *State v. Welke*, 298 Minn. 402, 216 N. W. 2d 641 (1974).

There are also state courts who after *Miller* have determined that their prior decisions gave no indication of the type of conduct to be covered by the obscenity statute. These decisions have also determined that it is not a proper judicial function to place a clarifying construction under part (b) of *Miller* on the statute. As a result, these courts have held the state obscenity statute unconstitutional. *People v. Tabron*, 544 P. 2d 372 (Col., 1976); *State v. Wedelstedt*, 213 N. W. 2d 652 (Ia., 1973); and *ABC Interstate Theatres, Inc. v. State*, 325 So. 2d 123 (Miss., 1976).

3. New obscenity legislation has been enacted since the Court's decision in *Miller v. California* by many states. Some states have specifically delineated the type of sexual

conduct, under part (b) of *Miller*, in terms virtually identical to *Miller's* two examples of patently offensive conduct. See for example, Arizona Revised Statutes, § 13-531.01 (1974); Delaware Code Annotated, Title 11, § 1364 (1974); and Tennessee Code Annotated, § 39-3010 (1974). Other legislative enactments provide quite specific lists of defined physical sexual conduct under part (b) of *Miller*. See for example, Louisiana Revised Statutes Annotated, Chapter 1, § 14:106 (1974); New York Penal Law Consol.), § 235.00 (1974); and Vernon's Texas Penal Code Annotated, Title 9, § 43.21 (1975). Finally, some other states since *Miller* have enacted legislation under which the dissemination of sexually explicit material to adults is not criminally proscribed. See for example, Iowa Code Annotated, Chapter 725, § 725.1 (1974); Revised Codes of Montana Annotated, § 94-8-110 (1975); and West Virginia Code, Article 8A, § 61-8A-1 et seq. (1974).

4. In Illinois, since the Court's decision in *Miller v. California*, the Illinois Supreme Court has had multiple opportunities to address itself to the *Miller* construction issue. The court, however, has failed to place a proper construction on the statute. The court has ignored the question of whether or not prior Illinois decisions have limited the application of the statute, Chapter 38, § 11-20, Illinois Revised Statutes. See *People v. Ridens (Ridens II)*, 59 Ill. 2d 362, 371, 321 N. E. 2d 264, 270 (1974). Indeed, a dissenting Justice Davis in *Ridens II*, and a federal three-judge court in *Eagle Books v. Reinhard*, 418 F. Supp. 345 (three-judge, N. D. Ill., 1976), in reviewing prior Illinois decisions concluded that no limiting construction had ever been placed on the statute.

The Illinois Supreme Court has stated that the Illinois Obscenity Statute meets the part (b) requirement of *Miller* because it proscribes conduct that "appeals to a prurient interest." *People v. Ward*, 63 Ill. 2d 437, 440, 441, 349 N. E. 2d 47, 48, 49 (1976). The federal three-judge court in *Eagle Books* held that the Illinois Supreme Court had not made a proper *Miller* construction. *Eagle Books v. Reinhard*, 418 F. Supp. at 350. The type of construction placed on the statute by the Illinois Supreme Court ignores the mandate of *Miller v. California* and the types of construction that have been placed on other state statutes since *Miller*.

5. *Hamling v. United States*, 418 U. S. 87 (1974) is not authority for arguing that the Illinois Supreme Court has adopted a proper course. Instead, that case demonstrates how prior court decisions can serve as predicators of the final authoritative construction that is adopted on a statute. In *Hamling*, the United States Supreme Court used prior cases to engraft the two patently offensive examples from *Miller* onto the federal obscenity statute. Since Illinois has no such prior decisions, *Hamling* merely points out the deficiencies with the construction adopted by the Illinois Supreme Court.

A specific construction placed on a state's obscenity statute is important because it allows a bookstore owner to compare materials he proposes to sell with a written statute and make an objective determination that there is a risk that material may be obscene. Without the objective standard there is not proper notice. A statute which lacks such an objective standard is unconstitutional under the dictates of *Miller v. California*, 413 U. S. 15 (1973).

6. The materials before the Court in this case, "Bizarre World" and "Illustrated Case Histories, a Study of Sado-Masochism" are marginal materials. They may or may not fall within the two *Miller* examples of patently offensive sexual conduct. However, there are no examples of patently offensive sexual conduct in Illinois. A review of the materials should demonstrate they are entitled to First Amendment protection.

In conclusion, the Illinois Obscenity Statute, Chapter 38, § 11-20, Illinois Revised Statutes, is unconstitutional because it is vague, indefinite and uncertain, in violation of the specificity requirements of *Miller v. California*. The defendant's conviction should be reversed and the statute held unconstitutional.

ARGUMENT

1. The Miller Standards.

Miller v. California, 413 U. S. 15 (1973), established new standards under which a state obscenity law was to be measured. These standards were not ordinary principles of law nor merely the rationale of a decided case. Indeed, in *Miller* the Court remanded the case to a California Appellate Court "for further proceedings not inconsistent with the *First Amendment standards* established by this opinion." *Miller v. California*, 413 U. S. at 37 (emphasis added). By pronouncing that its opinion had laid out "First Amendment standards", the Court was usher-

ing in a new era of constitutional litigation with respect to state obscenity statutes.

At the outset of its opinion the Court declared that its opinion would allow states to both "identify" and "regulate" obscene material. *Miller v. California,* 413 U. S. at 20. That identification and regulation was couched in these terms by the Court:

> "[W]e now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively constructed.[6] A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.
>
> "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."
>
> *Miller v. California,* 413 U. S. at 24 (citations omitted, Court's footnote).

In this passage, the Court indicated that it is constitutionally permissible for a state to have a criminal obscenity statute provided certain First Amendment guidelines are followed. Under these guidelines, a statute as written or as authoritatively construed by a state court must specifically delineate the types of physical sexual

conduct that are patently offensive. The Court clarified this further by stating:

> "We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, *supra*:
>
> "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> "(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."
>
> *Miller v. California,* 413 U. S. at 25.

The Court was concerned with the vagaries inherent in such a regulatory scheme. In passing on this point the Court noted:

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution."
>
> *Miller v. California,* 413 U. S. at 27.

The Court expressed hope that the new standard announced would remove the stresses placed on the state and federal court system by the obscenity issue. This hope was even more optimistically phrased because the Court's opinion in *Miller* represented the first occasion since *Roth*

v. United States, 354 U. S. 476 (1957), that "a majority of this Court has agreed to concrete guidelines to isolate 'hard core' pornography from expression protected by the First Amendment." *Miller v. California,* 413 U. S. at 29. Thus, the Court's decision in *Miller* can be characterized, for purposes of Wes Ward's case, as focusing on "First Amendment standards" that would identify "hard core" obscene material both for state law enforcement officers and for persons who might disseminate material dealing frankly with sexual matters. The *Miller* thesis, then, was that these First Amendment standards would be a viable solution to the "intractable obscenity problem." See *Interstate Circuit v. Dallas,* 390 U. S. 676 at 704 (Harlan, J., concurring and dissenting, 1968).

It has been nearly four years since these *Miller*-First Amendment standards were announced. While it cannot be said that the institutional stress referred to by the Court in *Miller* has been eased, subsequent events seem to support the Court's *Miller* thesis. A variety of state appellate court action and legislative action demonstrates not the ultimate soundness of this *Miller* thesis, which only a much greater passage of time can do; rather, they illustrate that the *Miller* concepts can deal with state obscenity statutes in a constitutional framework to bring about a system of uniform procedural and trial treatment of the obscenity question. This in turn allows diverse communities to make public judgments that specific sexually oriented material will be accepted or not accepted in those communities.

It is to be emphasized that the wisdom of the *Miller*-First Amendment standards is not under attack in this

case. Indeed, what is under attack is a single state's failure to embrace the *Miller* concepts and apply them to its own state obscenity statute, thereby rendering that statute unconstitutional and void. A review of some other state appellate court decisions and legislative efforts will place this latter contention in proper perspective.

In post-*Miller* decisions, state appellate courts have had to consider whether an "authoritative construction" could be made on their respective obscenity statute. The significant *Miller footnote* 6 (designated in the quotation from *Miller* in this brief at page 12, *ante,*) suggested that states prior to the Court's decision in *Miller* could have anticipated the wisdom of the specificity and fair notice requirements of *Miller.* That footnote also asserted that a state could accept the wisdom of the *Miller* court's judgment in a post-*Miller* authoritative construction. Footnote 6 provided:

> "See, *e. g.,* Oregon Laws 1971, c. 743, Art. 29, §§ 255-262, and Hawaii Penal Code, Tit. 37, §§ 1210-1216, 1972 Hawaii Session Laws, Act. 9, c. 12, pt. II, pp. 126-129, as examples of state laws directed at depiction of defined physical conduct, as opposed to expression. Other state formulations could be equally valid in this respect. In giving the Oregon and Hawaii statutes as examples, we do not wish to be understood as approving of them in all other respects nor as establishing their limits as the extent of state power.
>
> "We do not hold, as Mr. Justice Brennan intimates, that all States other than Oregon must now enact new obscenity statutes. Other existing state statutes, as construed heretofore or hereafter, may well be adequate. *See United States v. 12 200-ft. Reels of Film,* 413 U. S. at 130 n. 7."
>
> *Miller v. California,* 413 U. S. at 24.

A proper analysis of post-*Miller* activity requires an understanding of the alternatives available to state courts and state legislatures.

First, the question facing a state appellate court, normally the state's supreme court, after *Miller v. California,* 413 U. S. 15 (1973), would be whether or not prior state court appellate decisions had given specific direction or delineation about proscribed physical sexual conduct, the depiction or description of which could render material potentially obscene. If the answer to this question was in the affirmative, that state statute could constitutionally be construed to have embraced the *Miller* specificity outlined in part (b) of the *Miller* tripartite test. That statute then could be retroactively applied to pre-*Miller* conduct, that is, arrests and trials for dissemination of material prior to *Miller v. California.* However, if the answer to this query was negative, the state court would further have to determine whether it could place any type of construction at all on the state obscenity statute, or whether this would properly be a legislative function. If a construction engrafting specificity onto the statute were made, constitutional principles announced in cases such as *Bouie v. City of Columbia,* 378 U. S. 347 (1964), would prevent the retroactive application of that statute, as construed. If the court has not made a prospective construction of the statute, it would have no alternative but to hold the statute unconstitutional on the ground that, as written, the law violated standards of due process under the First and Fourteenth Amendments to the Constitution of the United States. A criminal statute, especially affecting First Amendment rights, must be carefully drawn to give a

reasonable man fair notice of the proscribed conduct. *United States v. Harriss,* 347 U. S. 612 (1954).

Either before or after judicial encounters with the obscenity statutory construction problem, a state legislature could, of course, adopt a new obscenity statute which in written statutory terms could embrace the *Miller* tripartite test and could further specifically define the "patently offensive sexual conduct", the depiction or description of which would render material potentially obscene. In addition, it would be within the state legislature's power to make the dissemination of sexually oriented material to consenting adults non-criminal. In other words, there is no constitutional mandate that a state must have a criminal obscenity statute for all purposes.

2. Post-Miller State Court Decisions.

Categorization of announced state court decisions, federal court decisions concerning state obscenity statutes, and state legislative enactments reveals that in most instances this projected outline of possibilities has been followed. In reviewing obscenity statutes in post-*Miller* decisions some state courts have looked to their own prior decisions and ascertained that those decisions gave a putative defendant notice of the specific type of physical sexual conduct that would be proscribed by the statute. Consequently, these states have placed a construction on their statute to bring it within the *Miller* First Amendment standards. *E. g. People v. Enskat,* 33 Cal. App. 3d 900, 909, 910, 109 Cal. Rptr. 433, 438, 439 (1973), cert. denied 418 U. S. 937 (1975); *Rhodes v. State,* 283 So. 2d 351, 354-359 (Fla., 1973); *Slaton v. Paris Adult Theater I,* 231 Ga.

312, 315, 316, 201 S. E. 2d 456, 459 (1973), cert. denied 418 U. S. 939 (1974); *Pierce v. State of Alabama,* 292 Ala. 473, —, 296 So. 2d 218, 221, 222 (1974), cert. denied 419 U. S. 1130 (1975); *People v. Heller,* 33 N. Y. 2d 314, 324-328, 307 N. E. 2d 805, 811-813 (1973); *West v. State,* 514 S. W. 2d 433, 441-448 (Tex. Ct. Crim. App., 1974); *Price v. Commonwealth,* 214 Va. 490, 493, 494, 201 S. E. 2d 798, 800 (1974), cert. denied 419 U. S. 902 (1975).

In *People v. Enskat,* 33 Cal. App. 3d 900, 109 Cal. Rptr. 433 (1973), for example, the Court decided the specificity question of § 311 of the California Penal Code, that state's obscenity statute, in this manner:

> "[W]e hold that section 311 is to be applied in appellant's case as it has previously been construed, (and without eliminating the statutory requirement that an obscene work is one 'utterly without redeeming social importance') we pause but briefly with appellant's contention that section 311 has not been authoritatively construed in the past so as to limit its reach to specifically defined sexual conduct. The contention is incorrect.
>
> "In requiring that obscene matter must go 'substantially beyond contemporary limits of candor in description or representation of such matters', the statute is substantially the same as the general *Miller* formulation which inquires 'whether the work depicts or describes, in a patently offensive way, sexual conduct'. *Miller* states that those matters must be 'specifically defined by the applicable state law'. Previous California cases have so limited section 311. Thus, it is clear that section 311 prohibits only 'hard-core pornography' (Zeitlin v. Arnebergh, 59 Cal. 2d 901, 31 Cal. Rptr. 800, 383 P. 2d 152), that nudity does not equate with obscenity and that 'no matter how ugly or repulsive the presentation, we are not to hold nudity, absent a sexual activity, to be obscene' (People v. Noroff, 67 Cal. 2d 791 at 797, 63 Cal. Rptr. 575 at 579, 433 P. 2d 479 at 483), and that 'To constitute obscenity . . . the material must contain a graphic description of sexual activity' (People v. Cimber, 271 Cal. App. 2d Supp. 867, 869, 76 Cal. Rptr. 382, 383). Further, and with respect to material of similar character to that involved here, Landau v. Fording, 245 Cal. App. 2d 820, 54 Cal. Rptr. 177 stated with reference to a film depicting among other things, fellatio, sodomy and oral copulation that 'It should be readily apparent from the preceding description that the film goes far beyond customary limits of candor in offensively depicting certain unorthodox sexual practices and relationships . . .' (245 C. A. 2d at 826, 54 Cal. Rptr. at 181). The film was held to be obscene with[in] the meaning of section 311."

People v. Enskat, 33 Cal. App. 3d at 908-910, 109 Cal. Rptr. at 438-439. (footnotes omitted)

This particular construction was expressly approved by the California Supreme Court in *Bloom v. Municipal Court for Inglewood J. D., etc.,* 16 Cal. 3d 71, 79-81, 127 Cal. Rptr. 317, 322, 323 (1976).

Other states have made the determination that while a *Miller*-type construction can be placed on an obscenity statute, this construction should have prospective effect only because of fair notice problems to the defendant, in the decided case. In *State v. Harding,* 114 N. H. 335, 320 A. 2d 646 (1974), the court first made a *Miller*-type construction, as follows:

> "[I]t is important to bear in mind that the *Miller* court expressly stated that prosecutions will be limited to representation or depictions of 'patently offensive "hard core" sexual conduct.' Miller v. Cali-

fornia, 413 U. S. at 27, 93 S. Ct. at 2616. The Court gave two examples of the type of activity falling within this phrase: (1) 'Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated' and; (2) 'Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.' *Id.* at 25, 93 S. Ct. at 2615. It is true that the qualifying phrases 'patently offensive' and 'lewd' do not precisely describe the activities banned by such examples. See 51 J. Urban L. 314, 321 (1973). Nevertheless, the thrust of the opinion is addressed to graphic representations or descriptions of (1) all forms of actual or simulated intercourse between humans or humans and animals in which the genitalis of one party is inserted into an orifice of another; (2) oral contact with the genitalia or manual contact with genitalia in a turgid state; (3) the insertion of any instrument or other device into the genital or anal passage in the course of activity designed to arouse or excite the genitalia; (4) the use of instruments or other devices by one party to inflict pain on another in the course of activity designed to arouse or excite the genitalia; or (5) the use of excrement or excretory functions in the course of activity designed to arouse or excite the genitalia; or (6) the genitalia in a turgid state. . . . [omitting citations] In our view these enumerated categories are sufficiently concrete to describe patently offensive 'sex' or 'sexual conduct' and to provide fair warning under *Miller* as to the scope of RSA 571-A:1 (Supp. 1972)."

State v. Harding, 114 N. H. at 341, 342, 320 A. 2d at 651.

The New Hampshire Supreme Court went on to discuss the views of dissenting justices on the United States Supreme Court about the failure of standards in the obscenity area to provide notice to potential defendants under obscenity laws. The New Hampshire Supreme Court thus stated:

> "The *Miller* opinion recognized this failure and stressed the need for specificity under state laws, as written or authoritatively construed. It is therefore not correct, as the State has urged, to say that the defendant had sufficient warning under the Roth-Memoirs test as to the obscene nature of the materials in issue. . . . [omitting citations] Under the circumstances of this case, we believe that it would be impermissible to subject the defendant to a trial on these issues in these cases."
>
> *State v. Harding,* 114 N. H. at 343, 344, 320 A. 2d at 652.

See also, *State v. Welke,* 298 Minn. 402, 406-413, 216 N. W. 2d 641, 645-649 (1974); and *State v. DeSantis,* 65 N. H. 462, 471-474, 323 A. 2d 489, 494, 495 (1974).

Other courts, upon review of certain state obscenity statutes under the *Miller* First Amendment standards, have concluded that the statute neither as written nor as previously construed by the respective state court meets the specificity requirements under part (b) of *Miller.* Accordingly, those courts, both state and federal, have held that certain state obscenity statutes are unconstitutionally vague. *People v. Tabron,* 544 P. 2d 372, 378-380 (Col., 1976); *State v. Wedelstedt,* 213 N. W. 2d 652, 656 (Ia., 1973); *State v. Shreveport News Agency Inc.,* 287 So. 2d 464, 468-470 (La., 1973); *Commonwealth v. Horton,* 310 N. E. 2d 316, 320-322 (Mass., 1974); *People v. Bloss,* 394 Mich. 79, 80, 228 N. W. 2d 384, 385 (1975); *ABC Interstate Theatres, Inc. v. State,* 325 So. 2d 123, 126, 127 (Miss., 1976); *McCright v. Olson,* 367 F. Supp. 937, 944, 945 (three-

judge, D. N. D. 1973); *Commonwealth v. McDonald*, 347 A. 2d 290, 295-299 (Pa., 1975). The rationale and decision of such cases is illustrated by the language of the Supreme Judicial Court of Massachusetts in reviewing the constitutionality of Massachusetts General Laws Annotated, Chapter 272, § 28A:

> "A review of our decisions indicates that we have not authoritatively construed § 28A in a way which has 'specifically defined' the sexual conduct whose portrayal is barred by statute. Certainly our decisions fall far short of the degree of definiteness appearing in statutes in Oregon and Hawaii, whose definition of prohibited conduct was at least qualifiedly endorsed in the *Miller* opinion *(supra,* 413 U. S. 24, fn. 6, 93 S. Ct. 2607). Our decisions also fall far short of the 'plain examples' given in the *Miller* opinion (see fn. 4 above). The most we have ever said was said in a negative way in a rescript opinion complying with what we viewed as the requirement of the Supreme Court of the United States. See Commonwealth v. Donahue, 358 Mass. 803, 262 N. E. 2d 589 (1970) ('[n]one of the pictures, however, explicitly portrayed copulation or other sexual congress'). See also Commonwealth v. Palladinoe, 358 Mass. 28, 32, 260 N. E. 2d 653 (1970), and Commonwealth v. Bitsocos, Mass. (1972), 281 N. E. 2d 227, for even more general characterizations in the same vein. The opinion in the *Donahue* case was not designed as an authoritative construction of our statute (G. L. c. 272, § 28A) so as to provide a definition of proscribed sexual conduct. The Court of Appeals for the First Circuit was correct in indicating in Literature, Inc. v. Quinn, 482 F. 2d 372, 375 (1973), that this court has not 'specifically defined' (see Miller v. California, *supra,* 413 U. S. at 24, 93 S. Ct. 2607) those activities which under § 28A may not be depicted or described. It is therefore clear that the opportunity is not fairly available to us, as it was in certain other States (see fn. 5 above), to conclude the constitutional requirements of specificity have been met by our decisions previous to the *Miller* decision.
>
> * * *
>
> "People are entitled to know what they may or may not do under the threat of imprisonment or fine. Our general obscenity statute does not furnish any guidance. As previously indicated, we decline to undertake the task of trying to list the specific sexual conduct whose display or description § 28A proscribes. To do so would constitute a judicial rewriting of that statute. Thus if there is to be regulation in the Commonwealth in the area of the sale or showing of pornographic works to adults, it must be achieved by explicit new legislation."
>
> *Commonwealth v. Horton*, 310 N. E. 2d at 321, 322.

3. Post-Miller State Legislative Action.

State legislatures have also responded to the Court's decision in *Miller*. Twenty-two state statutes have been enacted or amended since the Court's decision in June, 1973. The predominate change from pre-*Miller* statutes is a specific declineation or definition of physical sexual conduct under part (b) of the *Miller* tripartite test. Some such statutes delineate the proscribed sexual conduct in virtually the exact terms of the two "patently offensive" examples of *Miller*. *E.g.* Arizona Revised Statutes, § 13-531.01 (1974); Delaware Code Annotated, Title 11, § 1364 (1974); Idaho Code, § 18-4101 (1976); and Tennessee Code Annotated, § 39-3010 (1974). For example, Delaware's definition of obscenity contained in § 1364 of Title 11, Delaware Code Annotated, provides:

"Material is obscene if:

(1) The average person applying contemporary community standards would find the material, taken as a whole, appeals to the prurient interests; and

(2) The material depicts or describes:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; or

(b) Patently offensive representations or descriptions of masturbation, excretory functions, and/or lewd exhibitions of the genitals; and

(3) The work taken as a whole lacks serious literary, artistic, political or scientific value. (11 Del. C. 1953, § 1364; 58 Del. Laws, c. 497, § 1; 59 Del. Laws, c. 236, § 1.)"

Other state statutes, enacted since *Miller*, provide for a more specific subset of defined physical sexual conduct, which can render material potentially obscene. Georgia Code Annotated, § 26-2101 (1975); Burns Indiana Statutes Annotated, Chapter 10.1, § 35-30-10.1-1 (1975); Kentucky Revised Statutes, Chapter 531, § 531.010 (1974); Louisiana Revised Statutes Annotated, Chapter 1, § 14:106 (1974); Annotated Laws of Massachusetts, Chapter 272, § 31 (1974), Nebraska Revised Statutes, Chapter 28, § 28-926.11 (1975); New York Penal Law (Consol.), § 235.00 (1974); General Statutes of North Carolina, § 14-190.1 (1973); North Dakota Century Code, Chapter 12.1-27.1, § 12-1-27.1-01 (1975); Ohio Revised Code Annotated, Title 29, § 2907.01 (1975); Vernon's Texas Penal Code Annotated, Title 9, § 43.21 (1975); Utah Code Annotated, § 76-10-1201 (1975); Code of Virginia, Article 5, § 18.2-372

and § 18.2-390 (1975). Louisiana, for example, in its post-*Miller* obscenity statute, provides:

"Hard core sexual conduct is the public portrayal, for its own sake, and for ensuing commercial gain of:

(a) Ultimate sexual acts, normal or perverted, actual, simulated or animated, whether between human beings, animals or an animal and a human being; or

(b) Masturbation, excretory functions or lewd exhibition, actual, simulated or animated, of the genitals, pubic hair, anus, vulva or female breast nipples; or

(c) Sadomasochistic abuse, meaning actual, simulated or animated, flagellation or torture by or upon a person who is nude or clad in undergarments or in a costume which reveals the pubic hair, anus, vulva, genitals or female breast nipples, or the condition of being fettered, bound or otherwise physically restrained, on the part of one so clothed; or

(d) Actual, simulated or animated, touching, caressing or fondling of, or other similar physical contact with, a pubic area, anus, female breast nipple, covered or exposed, whether alone or between humans, animals or a human and an animal, of the same or opposite sex, in an act of apparent sexual stimulation or gratification; or

(e) Actual, simulated or animated stimulation of a human genital organ by any device whether or not the device is designed, manufactured and marketed for such purpose.

Louisiana Statutes Annotated-Revised Statutes, Chapter 1, § 14:106, at page 201.

The last category of post-*Miller* obscenity statutes are those where the state has provided no criminal sanction for the dissemination of obscene material to consenting adults,

although there may be criminal proscription for dissemination to minors or non-consenting adults, in some instances. *E.g.* Iowa Code Annotated, Chapter 725, § 725.1 (1974); Revised Codes of Montana Annotated, § 94-8-110 (1975); South Dakota Compiled Laws Annotated, Title 22, § 22-24-27, et seq. (1974); West Virginia Code, Article 8A, § 61-8A-1 et seq. (1974). Such laws normally do not state in positive terms that the dissemination of obscene material to adults is permissible (although see West Virginia Code, Article 8A, § 61-8A-7). Rather, the statutes provide for criminal proscription only for distribution or exhibition of material to minors.

Although some state court decisions leave a great deal to be desired in terms of explaining why and how a certain construction has been adopted (see, for example, *State v. Little Art Corp.*, 191 Neb. 448, 451, 452, 215 N. W. 2d 853, 856 [1974]), the impact on the states' obscenity prosecutions could be minimized by the enactment of a new obscenity statute, which includes specific *Miller*-type definitions of physical sexual conduct (*e. g.* Nebraska Revised Statutes, Chapter 28, § 28-926.11). The difficulty that the instant case presents to the court is that Illinois has neither engrafted onto an existing statute the specific definition of proscribed physical sexual conduct, nor has enacted new legislation which contains that specific definition. Wesley Ward and those similarly situated with him, in Illinois, have not had the benefit of the *Miller* First Amendment standards.

4. The Illinois Obscenity Statute.

On March 21, 1972, just two days prior to the defendant's trial in Peoria County, the Illinois Supreme Court announced its decision in *People v. Ridens,* 51 Ill. 2d 410, 282 N. E. 2d 691 (1972), (hereinafter referred to as *Ridens I*). *Ridens I* involved the construction of the Illinois Obscenity Statute, the same statute under which Wes Ward was charged. It defined obscenity as follows:

> "(b) Obscene Defined.
>
> A thing is obscene if, considered as a whole, its predominate appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in the description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs."
>
> Chapter 38, § 11-20, Illinois Revised Statutes.

In *Ridens I* the Illinois Supreme Court adopted the third element of the tripartite test set out by the plurality opinion in *Memoirs v. Massachusetts,* 383 U. S. 413 (1966), that to be obscene material had to be "utterly without redeeming social value." 51 Ill. 2d at 414, 282 N. E. 2d at 694.

Ridens I came to the United States Supreme Court by a petition for certiorari. The judgment of the Illinois Supreme Court was vacated and remanded for reconsideration after *Miller v. California,* 413 U. S. 15 (1973), as *Ridens v. Illinois,* 413 U. S. 912 (1973). On the remand, the Illinois Supreme Court again held the state obscenity statute constitutional, stating:

> "We need not and do not attempt to analyze the changes from the three-part *Roth-Memoirs* standard effected by the enunciation of the three-part *Miller* standard. It suffices to, and we now construe Section 11-20 of the Criminal Code . . . to incorporate parts (a) and (b) of the *Miller* standards."
>
> *People v. Ridens*, 59 Ill. 2d at 373, 321 N. E. 2d at 270. (Hereinafter referred to as *Ridens II*).

The court went on to reaffirm its belief that the third element in the test of obscenity, in Illinois, should remain "utterly without redeeming social value." *Ridens II*, 59 Ill. 2d at 373, 321 N. E. 2d at 270.

The Illinois Supreme Court, however, failed to address itself to the type of physical sexual conduct needed to be defined under part (b) of the *Miller* tripartite test. This occurred in spite of the fact that the Attorney General on behalf of the State of Illinois urged the court to consider prior decisions as having specifically limited the obscenity statute to cover only certain defined sexual conduct. The court made note of the Attorney General's argument, stating:

> "The People contend that, as 'heretofore authoritatively construed,' the obscenity statute, as required by *Miller v. California*, 'defines with particularity the kinds of specific sexual conduct which can be found obscene.' The People argue alternatively that if this court finds that the obscenity statute 'has not been previously construed to incorporate the *Miller* standard, the Court can and should now' so construe it."
>
> *Ridens II*, 59 Ill. 2d at 366, 321 N. E. 2d at 266.

In Ridens II, the court failed to give the statute the necessary specificity under the *Miller* First Amendment standards, stating instead:

> "We consider next whether the obscenity statute is impermissibly vague. Although not phrased in the exact language of *Miller*, the basic essential element of the statutory offense is that the material 'appeal to the prurient interest.' The statute specifically includes within the scope of 'the prurient interest' a 'shameful or morbid interest in nudity, sex, or excretion.'"

Ridens II, 59 Ill. 2d at 371, 321 N. E. 2d at 269. Justice Davis, who had authored the opinion in *Ridens I*, dissented, noting that prior Illinois decisions had never given the Illinois Obscenity Statute the definitive type of construction needed under part (b) of *Miller*. Accordingly, his position was that the obscenity statute was void for vagueness and overbreadth. *Ridens II*, 59 Ill. 2d 375 at 379, 321 N. E. 2d 271 at 272, 273 (Davis, J. dissenting). A petition for certiorari to the United States Supreme Court was filed but denied, 421 U. S. 993 (1975).

Thereafter, the Illinois Supreme Court had two further opportunities to give the state obscenity statute the needed specificity. However, in neither *People v. Gould*, 60 Ill. 2d 159, 324 N. E. 2d 412 (1975), nor in *People v. Hume, Inc.*, 60 Ill. 2d 397, 327 N. E. 2d 329 (1975), did the court give a proper construction under part (b) of *Miller*. At this time, the defendant brought his case before the Illinois Supreme Court.

The defendant attacked the state obscenity statute on the *Miller* part (b) grounds. He asserted that the statute as written and previously construed did not contain a delineation of specific sexual conduct, the depiction or representation of which in material could potentially render it obscene.

In the opinion below the Illinois Supreme Court answered the defendant's contentions in this manner:

> "In *People v. Ridens,* 51 Ill. 2d 410, we affirmed the convictions of defendants who had been found guilty of violating, *inter alia,* the Illinois obscenity statute by selling obscene publications. The United States Supreme Court subsequently remanded that case and directed us to reconsider our decision in light of the principles announced in *Miller* and related decisions. *(Ridens v. Illinois,* 413 U. S. 912, 37 L. Ed. 2d 1030, 93 S. Ct. 3046.) This court again affirmed the convictions and found that the Illinois obscenity statute was constitutional. *(People v. Ridens,* 59 Ill. 2d 362, *cert. denied,* 421 U. S. 993, 44 L. Ed. 2d 483, 95 S. Ct. 2000 (hereinafter referred to as Ridens II).) It was held in Ridens II that the obscenity statute was sufficiently clear and that it adequately informed the public of the conduct whose depiction is proscribed. We noted that the statutory definition of obscenity includes within the scope of the 'prurient interest' a 'shameful or mobid interest in nudity, sex, or exeretion.' The defendant argues that we erred in Ridens II in our interpretation of *Miller* and that *Miller* requires obscenity statutes to be much more specific in defining the type of material which will be considered obscene. We see no reason to reconsider our decision in Ridens II. It is extremely difficult to define the term 'obscenity' with a fine degree of precision. We again express our opinion that Illinois' statutory definition is sufficiently clear to withstand constitutional objections."
>
> *People v. Ward,* 63 Ill. 2d at 440, 441, 349 N. E. 2d at 48, 49.

While Wes Ward's case was pending, a three-judge federal district court was convened in the Northern District of Illinois, in a cause entitled *Eagle Books, Inc. v. Reinhard,* 418 F. Supp. 345 (three-judge, N.D. Ill.,

5/28/76). Oral argument in the three-judge case was heard the same day the Illinois Supreme Court announced its decision in *People v. Ward.* See *Eagle Books v. Reinhard,* 418 F. Supp. at 350.

After reviewing the opinion of the Illinois Supreme Court in *People v. Ward,* the three-judge federal court held the Illinois Obscenity Statute unconstitutional. That court first noted that:

> "An incorporation of the *Miller* tripartite standard cannot alone satisfy *Miller's* specificity requirement. *Miller* explicitly reserved for the states the specification itself. Not every state will seek to regulate all, or even the same subset of that material which can be constitutionally treated as obscene. Indeed, the Supreme Court of the United States expressly avoided demanding the use of its particular examples as a standard or proposed regulatory scheme. *Ridens II* might have explicitly included the *Miller* examples as its own, by construction, as did the Supreme Court in *Hamling* [418 U. S. 87 (1974)], but *Ridens II* did not. It remained after *Ridens II* for section 11-20 to be amended either legislatively or by state judicial construction to supply the wanting specificity so that the nature of the possible obscene materials being regulated, and their distinction from protected materials, could be adequately defined. *That definition is as essential to law enforcement officials who are charged with carrying out the law, as it is to juries* like the one in *Jenkins,* [418 U. S. 153 (1974)] who must apply the law to a set of facts."
>
> *Eagle Books v. Reinhard,* 418 F. Supp. at 349, 350 (court's emphasis).

After noting the quotation from the Illinois Supreme Court's opinion in *People v. Ward,* 63 Ill. 2d 437, 440, 441,

349 N. E. 2d 47, 48, 49 (1976), dealing with specificity, the federal court stated:

> "This court does not believe *Miller* can be properly construed as allowing the actual language of section 11-20 to be specific without the judicial engrafting of *Miller*-type examples, or other specifications such as those articulated in Justice Davis' dissent in *Ridens II*. As no such specification has been supplied by the Illinois Supreme Court, this court holds that section 11-20, as construed, is constitutionally invalid."
>
> *Eagle Books v. Reinhard,* 418 F. Supp. at 350.

Both the *Eagle Books* decision and the *Ward* decision were appealed to the United States Supreme Court. *Reinhard v. Eagle Books,* 76-366, appeal docketed 45 L. W. 3192 (9/10/76); *Ward v. Illinois,* jurisdiction noted, — U. S. —, 45 L. W. 3453 (1/10/77).

Defendant contends the rationale and holding of *Eagle Books v. Reinhard,* 418 F. Supp. 345 (three-judge, N. D. Ill., 1976), should be accepted by this Court. The rationale of that decision simply stated is that while it may be difficult to define obscenity with "precision," it is constitutionally required that it be defined within the First Amendment standards pronounced by *Miller v. California,* 413 U. S. 15 (1973). Those First Amendment standards, and most importantly, the specificity under part (b) of those standards, cannot be said to have been met by reference to material that "appeals to a prurient interest." If that were true, then the Court's decision in *Miller* meant nothing, since that subjective definition of obscenity was first announced in 1957 in *Roth v. United States,* 354 U. S. 476 (1957).

The *Roth* opinion, in dealing with the concept of "prurient appeal" noted the definition of obscenity in

A. L. I. Model Penal Code, § 207.10 (), (Tent. Draft No. 6, 1957):

> "'• • • A thing is obscene if, considered as a whole its predominant appeal is to prurient interest, i. e., a shameful or morbid interest in nudity, sex or excretion . . . .'" *Roth v. United States,* U. S. at 487, n. 20.

Indeed, virtually all state statutes would need no modification or construction after *Miller* if the Illinois Supreme Court's rationale were accepted, since the standard "appeal to prurient interest", as set out in the *Roth* footnote, was in all state statutes prior to *Miller v. California,* 413 U. S. 15 (1973). The reference to a state court's construction "heretofore or hereafter" of state obscenity statutes in *Miller v. California,* footnote 6, 413 U. S. at 24, is rendered meaningless if the Illinois Supreme Court's position is accepted.

This Court did not define "authoritative construction" in *Miller.* See *West v. State,* 514 S. W. 2d 433, 444, n. 4 (Tex. Ct. Crim. App., 1974). Defendant submits that an authoritative construction is one in which prior judicial decisions have given notice that that type of construction might or could be adopted. *Hamling v. United States,* 418 U. S. 87 (1974), is a good example of such authoritative construction.

5. Hamling Construction.

In *Hamling v. United States,* the petitioners had been arrested, indicted and convicted under a federal obscenity statute, 18 United States Code § 1461, in 1971. Their convictions were affirmed by the Ninth Circuit Court of Appeals, including reaffirmation after consideration of *Miller*

v. California, United States v. Hamling, 481 F. 2d 307 (1973). A petition for certiorari was granted. In the Court's opinion, the petitioners' argument concerning the federal obscenity statute was recited to be as follows:

> "Petitioners next argue that prior to our decision in *Miller,* 18 U. S. C. § 1461 did not contain in its language, nor had it been construed to apply to, the specific types of sexual conduct referred to in *Miller,* and therefore the section was unconstitutionally vague as applied to them in the prosecution of these cases."
>
> *Hamling v. United States,* 418 U. S. at 110, 111.

In rejecting this argument, the Court said:

> "Such an argument, however, not only neglects this Court's decisions prior to *Miller* rejecting vagueness challenges to the federal statute, but also fundamentally misconceives the thrust of our decision in the *Miller* cases."
>
> *Hamling v. United States,* 418 U. S. at 111.

The Court then referred to prior decisions in *Roth v. United States,* 354 U. S. 476 (1957); *Manual Enterprises, Inc. v. Day,* 370 U. S. 478 (1962); *Ginsburg v. United States,* 383 U. S. 463 (1966); and *United States v. Reidel,* 402 U. S. 351 (1971). The Court then stated:

> "At no point does *Miller* or any of the other obscenity decisions decided last Term intimate that the constitutionality of pre-*Miller* convictions under statutes such as 18 U. S. C. § 1461 was to be cast in doubt. Indeed, the contrary is readily apparent from the opinions in those cases. We made clear in *Miller,* 413 U. S., at 24 n. 6, that our decision was not intended to hold all state statutes inadequate, and we clearly recognized that existing statutes 'as construed heretofore or hereafter, may well be adequate.' That recognition is em-

> phasized in our opinion in United States v. 12 200-ft. Reels of Film, 413 U. S. 123 (1973). That case had come to this Court on appeal from the District Court's dismissal of the Government's forfeiture action under 19 U. S. C. § 1305 (a), which statute the District Court had found unconstitutional. In vacating the District Court's constitutional decision and remanding the case to the District Court for a determination of the obscenity *vel non* of the materials there involved, we stated:
>
> > 'We further note that, while we must leave to state courts the construction of state legislation, we do have a duty to authoritatively construe federal statutes where "a serious doubt of constitutionality is raised" and "'a construction of the statute is fairly possible by which the question may be avoided.'" United States v. Thirty-Seven Photographs, 402 U. S. 363, 369 (1971) (opinion of White, J.), quoting from Crowell v. Benson, 285 U. S. 22, 62 (1932). If and when such a "serious doubt" is raised as to the vagueness of the words "obscene," "lewd," "lascivious," "filthy," "indecent," or "immoral" as used to describe regulated material in 19 U. S. C. § 1305 (a) and 18 U. S. C. § 1462, see United States v. Orito, [413 U. S.,] at 140 n. 1, we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific "hard core" sexual conduct given as examples in Miller v. California, [413 U. S.,] at 25. See United States v. Thirty-Seven Photograph, *supra,* 402 U. S. at 369-374, 91 S. Ct. at 1404-1407 (opinion of White, J.). Of course, Congress could always define other specific "hard core" conduct.' 413 U. S., at 130 n. 7.
>
> "*Miller* undertook to set forth examples of the types of material which a statute might proscribe as portraying sexual conduct in a patently offensive way,

413 U. S. at 25-26, and went on to say that no one could be prosecuted for the 'sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law, as written or construed.' *Id.*, at 27. As noted above, we indicated in United States v. 12 200-ft. Reels of Film, *supra,* 413 U. S., at 130 n. 7, that we were prepared to construe the generic terms in 18 U. S. C. § 1462 to be limited to the sort of 'patently offensive representations or descriptions of that specific "hard core" sexual conduct given as examples in Miller v. California.' We now so construe the companion provision in 18 U. S. C. § 1461, the substantive statute under which this prosecution was brought. As so construed, we do not believe that petitioners' attack on the statute as unconstitutionally vague can be sustained."

Hamling v. United States, 418 U. S. at 112-114.

The import of this lengthy quotation from the *Hamling* opinion is that prior decisions could give defendants notice of the direction the specific limitation on an obscenity statute could take. In the *Hamling* case, that prior direction came not only from *United States v. 12 200-ft. Reels of Film,* 413 U. S. 123 (1973), but from *Roth v. United States,* 354 U. S. 476 (1957); *Manual Enterprises v. Day,* 370 U. S. 478 (1962); and *Ginzburg v. United States,* 383 U. S. 463 (1966), among others. The Court's point is that the decisions of the United States Supreme Court, with respect to the federal obscenity statute, had been pointing towards a specific delineation of "hard core" sexual conduct. Thus, in *Manual Enterprises v. Day,* Justice Harlan stated:

> "[W]e find lacking in these magazines an element which, no less than 'prurient interest,' is essential to a valid determination of obscenity under § 1461, and

> to which neither the Post Office Department nor the Court of Appeals addressed itself at all: These magazines cannot be deemed so offensive on their face as to affront current community standards of decency—a quality that we shall hereafter refer to as 'patent offensiveness' or 'indecency.' Lacking that quality, the magazines cannot be deemed legally 'obscene,' and we need not consider the question of the proper 'audience' by which their 'prurient interest' appeal should be judged.
>
> "The words of § 1461, 'obscene, lewd, lascivious, indecent, filthy or vile,' connote something that is portrayed in a manner so offensive as to make it unacceptable under current community *mores.* While in common usage the words have different shades of meaning, the statute since its inception has always been taken as aimed at obnoxiously debasing portrayals of sex. Although the statute condemns such material irrespective of the *effect* it may have upon those into whose hands it falls, the early case of *United States v. Bennett,* 24 Fed. Cas. 1093 (No. 14571), put a limiting gloss upon the statutory language: the statute reaches only indecent material which, as now expressed in *Roth v. United States, supra,* at 489, 'taken as a whole appeals to prurient interest.' "
>
> *Manual Enterprises v. Day,* 370 U. S. at 482-484 (footnotes omitted, court's emphasis).

The phrase "obnoxiously debasing portrayals of sex" is significant since it indicates a limitation on the basis of sexual conduct. Later in his opinion in *Manual Enterprises v. Day,* Justice Harlan stated:

> "It is only material whose indecency is self-demonstrating and which, from the standpoint of its effect, may be said predominantly to appeal to the prurient interest that Congress has chosen to bar from the mails by the force of § 1461."

Manual Enterprises v. Day, 370 U. S. at 487, 488 (court's emphasis).

Obscenity that is "self-demonstrating" is an objective standard, again limiting the subjective "appeal to the prurient interest test.

Then, in *Ginsburg v. United States,* 383 U. S. 463 (1966), Justice Harlan in a dissenting opinion stated:

> "I believe that under this statute the Federal Government is constitutionally restricted to banning from the mails only 'hardcore pornography.' "
>
> *Ginsburg v. United States,* 383 U. S. at 493 (Harlan, J. dissenting).

Although "hard core" material was never specifically defined by a majority of the Court, Justice Stewart in a footnote to his dissenting opinion in *Ginsburg v. United States,* 383 U. S. 463 (1966), stated with respect to "hard core" material:

> "' • • • Such materials include photographs, both still and motion picture, with no pretense of artistic value, graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character. They also include strips of drawings in comic-book format grossly depicting similar activities in an exaggerated fashion. There are, in addition, pamphlets and booklets, sometimes with photographic illustrations, verbally describing such activities in a bizarre manner with no attempt whatsoever to afford portrayals of character or situation and with no pretense to literary value. All of this material • • • cannot conceivably be characterized as embodying communication of ideas or artistic values inviolate under the First Amendment. • • •' "
>
> *Ginsburg v. United States,* 383 U. S. at 500, n. 3 (Stewart, J., dissenting).

Thus, it can be seen that part (b) of the *Miller* First Amendment standards, and the two examples of patently offensive conduct given by the *Miller* majority, are a codification of "hard core" sexual conduct which evolved in the Court's decisions since *Roth v. United States,* 354 U. S. 476 (1957). Just as this type of authoritative construction was needed and given by the United States Supreme Court with respect to federal obscenity laws, state courts in cases after *Miller* were required constitutionally to adopt one of the three alternatives, previously discussed (see pages 17-23 *ante*), concerning state obscenity laws. Illinois has failed this *Miller* constitutional requirement.

In Illinois, the Illinois Supreme Court opinions, including *People v. Ward,* 63 Ill. 2d 437, 349 N. E. 2d 47 (1976), are based on the statute and its definitions, as written. Realistically, Illinois has had no *Miller* construction placed on its obscenity statute. Defendant's past and future conduct, and others similarly situated with him in Illinois, has received no guidance about the specific contents of material available for sale in retail bookstores or for viewing in movie theaters. The First Amendment standards announced in *Miller* must be recognized to give Wesley Ward notice that his conduct could run afoul of a criminal statute. Instead, the Illinois decisions obscure the rationale underlying them, a vice of unconstitutional proportions. The Illinois Supreme Court concludes that the publications at issue here are obscene, and that they contain patently offensive sexual conduct, but the court does not say what that sexual conduct is. Because the court said the material was obscene, does not end the inquiry. See for example, *Jenkins v. Georgia,* 418 U. S. 153 (1974).

Part (b) of *Miller* is the objective portion of the tripartite test that gives notice to a disseminator of potentially obscene material. In other words, a bookstore owner should be able to take his magazines, or a theater owner his films, and compare their contents with the list of specified conduct delineated in the statute. If he finds the prohibited conduct depicted in the material he can then seriously evaluate the material's appeal to prurient interest, or lack thereof, and the materials literary, artistic, political, etc. value, or lack thereof. He can intelligently decide whether or not he runs the risk of criminal prosecution for disseminating obscene material. But without the objective delineation there can be no triggering mechanism—no chance to compare the material with the terms of the statute, as written or authoritatively construed, and no chance to make the decision concerning the risks of disseminating it.

These problems are magnified because while a disseminator may have problems with the vagaries of a statute, which may lead to self-imposed restraints on distribution (what the late Justice Black called "fear of a wrong guess", *Barenblatt v. United States*, 360 U. S. 109 at 137 [Black, J., dissenting, 1959]), law enforcement officials also have no objective guide as to what type of material may legitimately be prosecuted. Their activities in attempting to enforce the vague law lead to an even greater imposition of censorship. The end result is the arbitrary restriction of dissemination of ideas about sexual matters.

6. Obscenity vel non of Publications.

The statutory problem is emphasized in this case because of the marginal nature of the materials. The two publications at issue, which were certified for review to this Court, can be compared with no definitive listing of physical sexual conduct. Illinois has no such listing. Indeed one, "Bizarre World" in its pictorial portrayals and written articles has nothing that would fall within the "patently offensive" examples of *Miller*. The other publication, "Illustrated Case Histories, a study of Sado-Masochism," is marginal and may or may not fall within the two *Miller* examples. The defendant, however, had no opportunity to make an objective judgment about the materials in this case because the Illinois Obscenity Statute, as written, and as construed by the Illinois Supreme Court, has not met the specificity requirements of *Miller*. Moreover, a review of the publications at issue here demonstrates that they deserve First Amendment protection.

It follows that where the *Miller* standards have not been met, nor even addressed, a restraint of constitutionally protected materials is likely to occur. Thus, the very danger *Miller* and its standards seek to avoid is enhanced, in the instant case, by the omission of the Illinois Supreme Court in its obscenity decisions. The dim and uncertain line between protected speech and obscenity may or may not have been crossed, but a defendant such as Wes Ward is never informed until he has been convicted.

———o———

CONCLUSION

This Court in *Miller* has set First Amendment standards which in the Court's judgment allow a state to properly strike a balance between protected and non-protected materials that deal frankly with sexual matters. A statute, neither written nor authoritative construed in accordance with the *Miller* First Amendment standards, is by definition void for vagueness and is incapable of giving guidance in the constitutional sense. The Illinois Obscenity Statute suffers from this constitutional deficiency and the Illinois Supreme Court has refused to correct the problem. The Illinois Obscenity Statute, Chapter 38, § 11-20, Illinois Revised Statutes, should be held unconstitutional and defendant's conviction reversed.

Respectfully submitted,

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APPENDIX A

First Amendment Constitution of the United States

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment Constitution of the United States

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

Chapter 38—Criminal Law and Procedure 38 § 11-21

11-20. § 11-20. **Obscenity.)** (a) Elements of the Offense.

A person commits obscenity when, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, he:

(1) Sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene writing, pic-

ture, record or other representation or embodiment of the obscene; or

(2) Presents or directs an obscene play, dance or other performance or participates directly in that portion thereof which makes it obscene; or

(3) Publishes, exhibits or otherwise makes available anything obscene; or

(4) Performs an obscene act or otherwise presents an obscene exhibition of his body for gain; or

(5) Creates, buys, procures or possesses obscene matter or material with intent to disseminate it in violation of this Section, or of the penal laws or regulations of any other jurisdiction; or

(6) Advertises or otherwise promotes the sale of material represented or held out by him to be obscene, whether or not it is obscene.

(b) Obscene Defined.

A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs.

(c) Interpretation of Evidence.

Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audiences if it ap-

pears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience.

Where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that material is being commercially exploited for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

In any prosecution for an offense under this Section evidence shall be admissible to show:

(1) The character of the audience for which the material was designed or to which it was directed;

(2) What the predominant appeal of the material would be for ordinary adults or a special audience, and what effect if any, it would probably have on the behavior of such people;

(3) The artistic, literary, scientific, educational or other merits of the material, or absence thereof;

(4) The degree, if any, of public acceptance of the material in this State;

(5) Appeal to prurient interest, or absence thereof, in advertising or other promotion of the material;

(6) Purpose of the author, creator, publisher or disseminator.

(d) Sentence.

Obscenity is a Class A misdemeanor. A second or subsequent offense is a Class 4 felony.

(e) Prima Facie Evidence.

The creation, purchase, procurement or possession of a mold, engraved plate or other embodiment of obscenity specially adapted for reproducing multiple copies, or the possession of more than 3 copies of obscene material shall be prima facie evidence of an intent to disseminate.

(f) Affirmative Defenses.

It shall be an affirmative defense to obscenity that the dissemination:

(1) Was not for gain and was made to personal associates other than children under 18 years of age;

(2) Was to institutions or individuals having scientific or other special justification for possession of such material.

Amended by P.A. 77-2638, § 1, eff. Jan. 1, 1973.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-415

WESLEY WARD,

Appellant,

vs.

STATE OF ILLINOIS,

Appellee.

On Appeal From The Supreme Court Of Illinois

BRIEF FOR APPELLEE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-415

WESLEY WARD,

Appellant,

vs.

STATE OF ILLINOIS,

Appellee.

On Appeal From The Supreme Court Of Illinois

BRIEF FOR APPELLEE

The State of Illinois accepts appellant's statements in those portions of his brief labeled "Opinions Below", "Jurisdiction", "Questions Presented", "Constitutional Provisions and Statutes Involved", and "Statement [of the Case]".

SUMMARY OF ARGUMENT

1. The Illinois legislature and courts have consistently written and modified obscenity law to accommodate the evolving constitutional requirements formulated by this

Court in its many obscenity decisions. This practice was continued regarding the rules handed down in *Miller* v. *California,* 413 U.S. 15 (1973); the Supreme Court of Illinois specifically reprinted these rules in two post-*Miller* decisions and construed Ill. Rev. Stat., Ch. 38, §11-20 to incorporate parts (a) and (b) of the *Miller* standards along with the examples of obscenity in part (b).

2. Illinois' method of construing its Obscenity Statute to meet the stiffer *Miller* standards (not part (c) which relaxes the test of social value) is an authoritative construction and is essentially the same as the method used by this Court to save a less specific federal statute in *Hamling* v. *United States,* 418 U.S. 87 (1974). It is clearer than the methods used by other state and federal reviewing courts to construe and save their obscenity statutes. There are thus different valid ways to construe state statutes into conformity with *Miller,* without literally inserting *Miller's* examples into the statutes.

3. Even if the Supreme Court of Illinois had not clearly or sufficiently adopted parts (a) and (b) of *Miller's* standards with the examples of obscenity, nevertheless there exist substantive decisions by the Illinois reviewing courts defining obscenity which, when added to the already well-defined statute, provide enough specificity and certainty to render the Illinois statute constitutional.

4. Appellant's conviction under an obscenity statute that was re-constructed after he committed his offense does not offend due process since the materials he sold were obscene under both pre-*Miller* and post-*Miller* standards. He had adequate notice well before 1972 that the magazines he sold contained pictures which portrayed obscene conduct according to Illinois law.

ARGUMENT

I.

THE SUPREME COURT OF ILLINOIS DID CONSTRUE THE OBSCENITY STATUTE SO AS TO PROPERLY INCORPORATE INTO IT THIS COURT'S MILLER STANDARD, PARTS (A) & (B), INCLUDING THE SPECIFIC EXAMPLES OF OBSCENITY.

A. Historical Background.

The history of Illinois' obscenity law since 1960 shows a consistent desire on the part of the State, both legislatively and judicially, to adopt whatever rule has been approved by this Court. In the new Illinois Criminal Code of 1961, a different definition of obscenity was adopted based on this Court's decision in *Roth* v. *United States,* 354 U.S. 476 (1957). See, *People* v. *Biocic,* 224 N.E. 572, 575 (Ill. App. Ct., 1st Dist. 1967). Drafters of the Criminal Code said in their "Committee Comments" following the Obscenity Statute, Ill. Rev. Stat., Ch. 38, §11-20, that they essentially adopted the American Law Institute Model Penal Code draft on this subject. The "Comments" go on to say:

> "The basic position taken by the Committee is a realistic one in that it recognizes that today society often condones literature, movies, and other art which may incidentally provide erotic stimulation. And, in agreement with the drafters of the Model Penal Code, the Committee aimed primarily at the commercial dissemination of obscenity. (See generally Model Penal Code § 207.10, comment at 5-92, Tent. Draft No. 6, 1957).

Section 11-20 is similar to former Illinois legislation on this subject, although some changes have been made which should be noted. (See Ill.Rev.Stat. 1959, ch. 38, §§ 468-472a.) First of all, the definition of obscenity in subsection (b) is slightly different from that previously provided in the case law interpreting Illinois statutes. Under then existing law a thing was obscene if 'Its calculated purpose or dominant effect is substantially to arouse sexual desires, and if the probability of this effect is so great as to outweigh . . . artistic or other merits . . .' (*American Civil Liberties Union* v. *City of Chicago,* 3 Ill.2d 334, 121 N.E. 2d 585 (1954), *appeal dismissed,* 348 U.S. 979, 75 S. Ct. 572, 99 L.Ed. 839 (1955).) Under subsection (b) material must appeal to sexual interest (or interest in nudity or excretion), but it must also go beyond the customary limits of candor in the description of such things. This is perhaps a small difference, but the older definition may incorporate certain art or advertising matter which is generally accepted today, yet the dominant effect of which is to 'arouse sexual desires.' (*id.*)

A second significant departure from former law is the inclusion of a list of different types of evidence which are admissible as bearing on the question of whether the material is obscene (subsection (c)). This is unusual in a statute defining substantive offenses, but was deemed necessary in this area because of the elusive nature of the standards which determine obscenity. It is not necessary to conviction, of course, to introduce any or all of the types of evidence listed in subsection (c); nor does it provide an exclusive list of the types of evidence which may be admissible as bearing on the question of obscenity. These provisions are only listed to serve as a guide and to deter a trial court from holding any one of the types to be inadmissible in a proper case. . . .

A third important change is provided by subsection (f). The two affirmative defenses listed there have the effect of reserving criminal punishment for those situations in which the obscenity is disseminated to strangers for gain. Thus, private noncommercial dissemination between adults is no longer an offense. The Committee felt that such activity, although it might indicate impaired personal morals, or mental health, on the part of the parties involved, does not call for criminal sanctions by the State. . . .

The section is probably free from constitutional deficiencies, since a substantially similar prohibition against obscenity has been upheld by the United States Supreme Court against the contention that it violated the First and Fourteenth Amendments which insure freedom of communication. (See *Roth* v. *United States,* 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957).) This in itself is an improvement over the former legislation. . . ." S.H.A. (1964), Ch. 38, §11-20.

When this Court added the utterly-without-redeeming-social-value test to the requirements for a constitutional obscenity law [*Memoirs* v. *Massachusetts,* 383 U.S. 413 (1966)], the Supreme Court of Illinois construed the Obscenity Statute discussed above to include the new test. *People* v. *Romaine,* 38 Ill. 2d 325, 231 N.E. 2d 413 (1967); *City of Blue Island* v. *DeVilbiss,* 41 Ill. 2d 135, 242 N.E. 2d 761, 764 (1969), as explained in *People* v. *Burkhardt,* 297 N.E. 2d 694, 697 (Ill. App. Ct., 1st Dist. 1973). Also the Illinois General Assembly amended Ch. 38, §11-20 following *Memoirs* to add the second sentence of subsection (c), "Interpretation of Evidence", concerning commercial exploitation and the conclusion that the material in question is utterly without redeeming social importance. S.H.A. (1972 Suppl.), Ch. 38, §11-20. Following *Jacobellis* v. *Ohio,* 378 U.S. 184 (1964), the Illinois reviewing courts under-

took to make an independent constitutional judgment on all materials which provided the basis for obscenity convictions. *City of Blue Island* v. *DeVilbiss,* 242 N.E. 2d at 763.

As a result of its faithful conformity to this Court's decisions on obscenity, Illinois now finds after *Miller* that it has a statute which is stricter in one respect from the prosecution viewpoint than the latest federal standard—the statute includes the utterly-without-redeeming-social-value test. *People* v. *Ridens* II, 59 Ill. 2d 362, 321 N.E. 2d 264 (1974).

B. The Statute's Most Recent Construction.

The major refinement of obscenity law decreed by *Miller* v. *California,* 413 U.S. 15 (1973), was its requirement that obscenity statutes be revised or construed to more specifically define the sexual portrayals prohibited therein. The *Miller* Opinion stressed several times that the needed specificity could be added to obscenity statutes through judicial construction by state courts of last resort. 413 U.S. at pp. 25, 26, 28 and Note 6. Judicial construction of obscenity statutes to bring them into line with *Miller* was accomplished or approved by this Court in *Hamling* v. *U.S.,* 418 U.S. 87 (1974), and *Miller* v. *California* II, 418 U.S. 915 (the second appeal of the *Miller* case, after the California courts had construed and upheld their statute following this Court's remand in *Miller* I).

Accordingly, the Illinois Supreme Court has twice construed Section 11-20 of the Criminal Code of 1961 as amended, so as to guarantee its conformity with the *Miller* standards of what constitutes obscenity.

In *People* v. *Ridens* II, 59 Ill. 2d 362, 321 N.E.2d 264 (1974) the Court sought to read the *Miller* formulae into the statute. See *People* v. *Watson,* 26 Ill. App. 3d 1081, 325 N.E.2d 629, 631 (1975) ("In Ridens . . . the . . . Court . . . stated that the Illinois statute substantially incorporates or is, at least, consistent with the requirements established in Miller"). In their lengthy *Ridens* II Opinion, the Illinois Supreme Court quoted the operative passages of *Miller,* pp. 24-26 in their entirety including the examples of obscenity, and then said: "It suffices to, and we now construe §11-20 of the Criminal Code and the Moline obscenity ordinance to incorporate parts (a) and (b) of the *Miller* standards." 59 Ill. 2d at 371.

The only difficulty with *Ridens* II is that the holding of the opinion fails to specifically refer back to and give specific incorporation to that part of Miller which states:

> "It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, supra:
>
> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."

Mr. Justice Davis, writing in dissent, noted this omission.

However, when the defendants in *Ridens* II again petitioned this Court for Certiorari alleging Illinois' noncompliance with *Miller,* their petition was denied even though four members of this Court voted to grant Certiorari and reverse the decision of the Illinois Supreme Court. 421 U.S. 993 (May 27, 1975). When added to the Illinois Supreme

Court's expressed intention of incorporating the *Miller* standards in *Ridens* II, this denial of certiorari seemed to indicate that the construction of ch. 38, §11-20 by the Illinois Court was complete and satisfied *Miller*.

Whatever doubt may have existed regarding the incorporation of *Miller* by Illinois was resolved ten months after *Ridens* II. In *People* v. *Gould,* 60 Ill. 2d 159, 324 N.E.2d 412 (1975) the Court analyzed its position *vis-a-vis Miller*:

> "In *Miller* v. *California,* the Supreme Court in describing the constitutional guidelines for the regulation of obscene material said . . .;
>
> '• • • State statutes designed to regulate obscene materials must be carefully limited. As a result, we now confine the permissible scope of such regulations to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.
>
> The basic guidelines for the trial of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. • • •
>
> We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of

> what a state statute could define for regulation under part (b) of the standard announced in this opinion, supra:
>
> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.'

At the direction of the Supreme Court of the United States, in *People* v. *Ridens*, 59 Ill.2d 362, 321 N.E.2d 264 (hereafter Ridens II), we consider further, in light of *Miller,* our earlier judgment in *People* v. *Ridens,* 51 Ill.2d 410, 282 N.E.2d 691 (Ridens I). We held in Ridens II that our obscenity statute (Ill. Rev. Stat. 1969, ch. 38, par. 11-20) remained constitutional, we construed our statute to incorporate parts of guidelines (a) and (b) of the *Miller* standards (*which are set out in the above quotation from Miller*) and stated that under our statute the third question or guideline which must be considered in determining whether the matter or work is obscene is whether it is "utterly without redeeming social value.' We explained that the more restrictive guideline (c), or part (c), of the *Miller* standard, *i.e.,* whether 'the work, taken as a whole, lacks serious literary, artistic, political, or scientific value' cannot be used. See Ridens II."

People v. *Gould,* 324 N.E.2d at 414-15, (emphasis added) (citations omitted).

The Illinois Supreme Court's reprinting of all the operative *Miller* passages and reincorporation of the guidelines "which are set out in the above quotation" clearly demonstrate that this Court's specific examples of obscenity were read into the Illinois obscenity statute in *Ridens II* and *Gould.* Thus, the court in *Eagle Books* v. *Reinhard,* 418 F. Supp. 345 (N.D. Ill. 1976), appeal pending, 45 L.W. 3192,

erred when it interpreted the *Ridens II* and *Gould* opinions as not adopting the *Miller* examples of obscenity as their own, in order to meet *Miller's* specificity requirement. The 3-Judge District Court, being too technical in its approach to appellate construction, ignored the plain intent of the Illinois justices in *Ridens II* and *Gould*.

II.

THE SUPREME COURT OF ILLINOIS AUTHORITATIVELY CONSTRUED THE OBSCENITY STATUTE USING A METHOD SIMILAR TO THE ONE EMPLOYED BY THIS COURT AND OTHER REVIEWING COURTS.

The same general technique employed by the Supreme Court of Illinois to incorporate the *Miller* examples of prohibited obscenity into ch. 38, §11-20 was used by this Court to save a federal obscenity statute in *Hamling* v. *United States*, 418 U.S. 87 (1974). The *Hamling* decision involved a statute which, like most federal obscenity laws, is much more general and undefined than the obscenity laws of many states, including Illinois.[1] No statutory definitions of the terms "obscene, lewd", etc., were supplied by Congress. In the course of the *Hamling* decision, this Court noted that 18 U.S.C. 1461 had frequently been sustained

[1] 18 U.S.C. 1461 reads in pertinent part:

"Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device or substance; and—

* * *

Every written or printed card, letter . . . of any kind giving information, directly or indirectly, where or how or from whom, of by what means any of such mentioned matters, articles or things may be obtained or made. . . . Is declared to be nonmailable matter and shall not be delivered from any post office or by any letter carrier."

against constitutional attacks and quoted approvingly from *Roth* v. *United States*, 354 U.S. at 491-92, saying that lack of precision is not itself offensive to the requirements of due process and that the statutory language must simply convey sufficient warning as to the proscribed conduct when measured by common understanding and practices. The *Hamling* Opinion then quoted Justice Harlan's decision in *Manual Enterprises* v. *Day*, 370 U.S. 478 (1962) interpreting the federal statute as always having been taken "as aimed at obnoxiously debasing portrayals of sex", and it referred to this as an authoritative construction of the statute consistent with *Miller*. 418 U.S. at 113. However, most likely believing that the older authoritative construction did not come up to *Miller's* concept of specificity, the *Hamling* decision then construed 18 U.S.C. 1461 to be limited to the kind of conduct listed in the *Miller* examples of obscenity. Nevertheless, the Opinion did not in so many words repeat and adopt *Miller's* list of obscene types of materials. It simply stated:

> "As noted above, we indicated in *U.S.* v. *12 200-ft. Reels of Film*, supra, 413 U.S. at 130 n.7, 93 S.Ct. at 2670, that we were prepared to construe the generic terms in 18 U.S.C. 1462 to be limited to the sort of 'patently offensive representations or descriptions of that specific "hard core" sexual conduct given as examples in *Miller* v. *California*.' We now so construe the companion provision in 18 U.S.C. 1461, the substantive statute under which this prosecution was brought. As so construed, we do not believe that petitioner's attack on the statute as unconstitutionally vague can be sustained." 418 U.S. at 115.

This is essentially what the Illinois Supreme Court said against a similar historical backdrop of statutory construction (see Arg. III, infra), in *Ridens II* and *Gould, supra,*

when it reprinted the governing portions of *Miller*, including the examples, and then construed Ch. 38, §11-20 to include those requirements.

Two other post-*Miller* federal obscenity decisions were even less technical than the Supreme Court of Illinois in construing statutes to conform with the *Miller* requirements. In *United States* v. *Thevis*, 484 F. 2d 1149, 1155 (5th Cir. 1973), cert. denied, 418 U.S. 932 (1974), the Court heard a challenge to 18 U.S.C. 1462[2] for lacking specificity and noted that this Court was "prepared to construe" its terms as regulating only the obscene material listed in *Miller*. The Court of Appeals concluded:

> "We believe that this answers the question and that the *definition of Miller is a gloss properly added to* §1462. The effect is to substitute the *Miller* definition of 'obscene' for the *Memoir's* definition. On this basis we proceed to an examination of the materials which underlie the indictment." 484 F. 2d at 1155. (Emphasis added).

Finding that 6 magazines contained pornographic pictures and were utterly without redeeming social value, the court affirmed the convictions for the pre-*Miller* transportation of these magazines.

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2 18 U.S.C. 1462 reads:

> "Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—(a) any obscene, lewd, lascivious, or filthy books, pamphlet, picture, motion-picture, film, paper, letter, writing, print, or other matter of indecent character; . . . Shall be fined no more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter."

If the *Miller* specificity requirements are properly considered a constitutionally necessary gloss on existing federal obscenity statutes, the same concept would logically apply to state statutes unless state legislatures or courts have ruled to the contrary. Such an automatic application is logical because, of course, this Court is the ultimate authority on what the First Amendment requires, and its interpretations are binding on the States. Formal re-printing of this Court's *Miller* requirements by state high courts would thus seem to be unnecessary, given the stature and binding character of the *Miller* Opinion.

In *United States* v. *Gower*, 503 F. 2d 189 (D.C. Cir. 1974), the defendant had been convicted of pre-*Miller* possession and sale of obscene photographs and films in violation of 22 D.C. Code §2001(a)(1), a statute which did not define the words "obscene", "indecent", or "filthy".[3] Addressing

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3 22 D.C. Code §2001(a)(1) provided:

> "It shall be unlawful in the District of Columbia for a person knowingly—
>
> (A) to sell, deliver, distribute, or provide, or offer or agree to sell, deliver, distribute, or provide any obscene, indecent, or filthy writing, picture, sound recording, or other article or representation;
>
> (B) to present, direct, act in, or otherwise participate in the preparation or presentation of, any obscene, indecent, or filthy play, dance, motion picture, or other performance;
>
> (C) to pose for, model for, print, record, compose, edit, write, publish, or otherwise participate in preparing for publication, exhibition, or sale, any obscene, indecent, or filthy writing, picture, sound recording, or other article or representation;
>
> (D) to sell, deliver, distribute, or provide, or offer or agree to sell, deliver, distribute or provide any article, thing,

(footnote continued on following page)

the issue of the statute's vagueness, the Court of Appeals said:

> "The language of the statute nowhere specifies the type of conduct to which *Miller* refers. The question therefore arises whether it may be so limited by the authoritative construction of the District of Columbia Court of Appeals. At present, we have no such authoritative construction. Federal courts are to decide questions of state law not yet decided by the highest state court. *In the present case, however, we see no reason to undertake a definite interpretation of § 2001 (a)(1),* which may have a short life in the light of subsequent D.C.C.A. opinions. It suffices for us to say that we are convinced that the statute will receive a limiting construction that will maintain its application to the facts of this case.
>
> The materials in this case were '[p]atently offensive representations . . . of ultimate sexual acts' and 'patently offensive representations . . . of masturbation.' See *Miller,* 413 U.S. at 25, 93 S. Ct. at 2615." (footnotes omitted, emphasis added). 503 F. 2d at 191.

The Court went on to say that the case, tried without a jury (as was the instant case), would undoubtedly have reached the same result if it had been tried after *Miller* and according to its requirements. The convictions were affirmed on all counts but one. This Opinion takes a much

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or device which is intended for or represented as being for indecent or immoral use;

(E) to create, buy, procure, or possess any matter described in the preceding subparagraphs of this paragraph with intent to disseminate such matter in violation of this subsection;

(F) to advertise or otherwise promote the sale of any matter described in the preceding subparagraphs of this paragraph; or

(G) to advertise or otherwise promote the sale of material represented or held out by such person to be obscene."

more casual aproach to construction of an obscenity statute to satisfy *Miller* than did the *Ridens II* and *Gould* decisions of the Illinois Supreme Court.

State reviewing courts have also re-construed their obscenity statutes without clearly adopting limiting examples of conduct proscribed by law from *Miller* or any other sources. The Oklahoma Supreme Court in *State ex rel. Field* v. *Hess,* 540 P. 2d 1165 (Okla. Sup. Ct., 1975) affirmed in modified form an injunction against an "adult book store" to prevent the sale of certain obscene materials, notwithstanding its owner's claim that the Oklahoma obscenity statutes were unconstitutional. The court summarized the basic *Miller* requirements without reprinting the examples of obscenity and then held that "The Oklahoma Obscenity Statutes here considered, 21 O.S. 1971 §§1021, 1040.51, 1040.12, are constitutional, even though the constitutional standards are not literally incorporated therein, for those standards are to be implied whenever the statutes are applied." 540 P. 2d at 1169.[4]

---

[4] The pertinent Oklahoma statutes read in part:

21 O.S. 1971 §1021—

"Every person who wilfully either:

• • •

(3) • • • sells, distributes, keeps for sale, or exhibits any obscene or indecent writing paper, book, picture, photograph, figure or form of any description;"

• • •

21 O.S. 1971 §1040.51—

"Any person who knowingly buys, sells, barters, traffics in, . . . any pictures, moving picture, series of pictures, drawing, diagram or photograph of any person or animal or caricature thereof in an act or acts of sexual intercourse of unnatural copulation shall be deemed guilty of a felony."

Section 1040.12 defined "obscene" as "that to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

The Supreme Court of Nebraska in affirming an obscenity conviction which had been vacated and remanded by this Court, reprinted the *Miller* standards of obscenity but did not construe the Nebraska statute (which is similar to but broader than the Illinois statute) to include the examples or any other *Miller* requirement. *State* v. *Little Art Corporation,* 215 N.W. 2d 853, 855-56 (Neb. Sup. Ct. 1974). The Court simply held that its statutes sufficiently defined obscenity for finders of fact,[5] that their meaning and purport were clear and that they already fully complied with *Miller.*

In *Price* v. *Commonwealth,* 201 S.E. 2d 798 (Sup. Ct. of Virginia 1974), on remand of an obscenity conviction from this Court, a definition of "obscene" identical to that used in Ill. Rev. Stat., Ch. 38, §11-20(b) was held in light of two earlier Virginia Supreme Court decisions to prohibit "only hard core pornography *such as the examples delineated in Miller* and [found] not [to] restrict constitutionally protected speech and writing. We do not believe that the *Miller* examples were intended to preempt or standardize state obscenity statutes . . ." 201 S.E. 2d at 800. (Emphasis added.) This is the only reference in the Opinion to the *Miller* examples with their application to Virginia law.

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5 Section 28-926.07, R.R.S. 1943 provides that:

". . . the standard for judging obscenity to be applied as a guide by finders of fact in considering the evidence is whether to the average person the dominant theme of said material or conduct which is at issue in such civil action or criminal proceedings, taken as a whole, appeals to the prurient interest, which is to excite lustful thoughts, or a shameful or morbid interest in nudity, sex, or excretion which goes substantially beyond the customary limits of candor."

The above citations indicate that there are different valid ways to construe state statutes into conformity with *Miller* and that an opinion does not have to literally insert *Miller* type examples into the statute to accomplish the goal. As this Court has already ruled, a state's obscenity law does *not* have to contain an encyclopedic listing of all prohibited conduct or portrayals, as in the new Louisiana statute (Appellant's Br. 25), to be constitutional. *Miller,* 413 U.S. at note 6; *Miller* v. *California II,* 418 U.S. 915 (1974); *Watkins* v. *South Carolina,* 418 U.S. 911 (1974) (last 2, appeals dismissed).

The way in which the Supreme Court of Illinois reprinted the crucial portions of *Miller* with the examples and then construed Ch. 38, §11-20 "to incorporate parts (a) and (b) of the *Miller* standards" (*People* v. *Ridens II,* 59 Ill. 2d at 371) is as clear a saving construction as the one in *Hamling* v. *United States,* 418 U.S. at 115, and is more clear than the construction expressed in the *Gower* and *Field* decisions above. Additionally, the Illinois obscenity statute was more specific to begin with than these other state and federal laws, since it defined prurient interest as "a shameful or morbid interest in nudity, sex or excretion." Of course, the Illinois Supreme Court's Opinion in the *present* case does not go deeply into construction of the Illinois obscenity definition because that question was already resolved by the Court in lengthy opinions in 1974 and 1975. Justice Crebs was correct in saying that there was no need to reconsider the *Ridens II* decision. *Ward,* 349 N.E. 2d at 49.

Therefore, the method of incorporation of *Miller's* requirements employed by the Illinois Court was effective and proper, and it precludes a successful attack on Ill. Rev. Stat., Ch. 38, §11-20(b).

III.

SUBSTANTIVE DECISIONS OF ILLINOIS REVIEWING COURTS HAVE LIMITED THE SCOPE OF THE OBSCENITY STATUTE'S PROHIBITION TO HARD CORE PORNOGRAPHY FOUND TO BE OUTSIDE THE FIRST AMENDMENT'S PROTECTION IN MILLER.

If a state court has not adopted the *Miller* examples of prohibitable conduct as a limitation on its obscenity law and if its legislature has not built some specificity into the statute, it is still possible for the statute to satisfy *Miller* requirements through limitations gradually placed on it during past interpretive decisions by the state's reviewing courts. *Miller* v. *California,* 413 U.S. at note 6; *Paris Adult Theater* v. *Slaton,* 413 U.S. 49 (1973); *Miller* v. *California* II, 418 U.S. 915 (1974). Appellant concedes this in his Brief at 16.

Several states with a history of limiting obscenity decisions from their high courts have ruled that the sum total of these decisions is a *Miller*-type requirement in state law that only patently offensive hard-core pornography is prohibitable. Appellant has noted these decisions in his Brief along with the opinions that construed *Miller* into their statutes at 17 and 18. The State of Illinois submits that its reviewing courts have a history of limiting obscenity decisions as sufficient to satisfy *Miller's* standard in Part (b) as are the decisions of those states whose courts announced they were following this path after *Miller.*

A. The Illinois Precedents.

The Illinois courts of review gave notice through their pre-*Miller* decisions that certain specific kinds of conduct or materials were within the definition of obscenity in Ill. Rev. Stat., Ch. 38, §11-20. In *People* v. *Sikora,* 32 Ill. 2d

260, 204 N.E. 2d 768, 772-73 (1965), Mr. Justice Schaefer, writing for an unanimous Supreme Court, held that three books mentioned in the indictment there were obscene under the same statutory definition of obscenity as applied in the present case. He specifically described the obscenity found in the three books as including "mutual masturbation", "self-fondling", "a circle of persons engaged in oral genital contact", "rape", flagellation with barbed wire", "lesbian foreplay", "sadism and masochism", and murder of a man by his sexual partner during intercourse. The Court concluded:

> "The sole appeal of these books is to the prurient interest, and the stimulation of that interest is clearly the author's intention. The aberrational conduct portrayed can appeal only to a shameful and morbid interest in nudity and sex. The kind of scenes that are described and the detail of description go beyond the customary limits of candor in this country. . . ." 204 N.E. 2d at 773.

This holding applying the exact language of the Illinois obscenity definition to descriptions of specific conduct was a limiting construction and gave public notice that at least these kinds of conduct could not be described or depicted in a book for sale, without violating the law. In the later decision of *City of Blue Island* v. *DeVilbiss,* 41 Ill. 2d 135, 242 N.E. 2d 761 (1969), the Supreme Court of Illinois held that four books underlying a misdemeanor conviction were obscene within the definition of a Blue Island ordinance, *which the Court noted was identical to the obscenity definition in the State Statute,* Ch. 38, §11-20. 242 N.E. 2d at 762. The Opinion specifically refers to the lurid descriptions in the books which render them obscene, including homosexual acts and assaults, rape, castration, masturbation, flagella-

tion, oral-genital acts and general sadism and masochism. 242 N.E. 2d at 764-65.

In another case where several convictions were obtained under Chicago's municipal Ordinance forbidding the sale of obscene materials, the Illinois Supreme Court took the logical step of applying its holdings on obscene descriptions in books to photo magazines which depicted conduct only described in the books. *City of Chicago* v. *Geraci,* 46 Ill. 2d 576, 264 N.E. 2d 153 (1970). The Court, speaking through Justice Schaefer, indicated its belief that a "sado-masochistic magazine which contains photographs portraying lesbianism, rape, whippings, beatings, bondage, axing and other abnormal sexual conduct" *was hard-core pornography.* At the same time, the Court held several magazines devoted to photographs of nude men and women not obscene. The definition of obscenity in the Chicago ordinance, a broader one than contained in the State Statute, did not contribute to or alter the Court's rulings. The Justices approached the convictions from the viewpoint of whether or not the magazines were protected by the First Amendment according to the standards set up by this Court, an inquiry that would be the same under either the Illinois Obscenity Statute or the Chicago Obscenity Ordinance. In concluding his *Geraci* Opinion, Justice Schaefer quoted extensively from the holding in *People* v. *Sikora, supra,* a case based upon the State statute. 264 N.E. 2d at 158.

Several other pre-1972 Illinois reviewing court decisions clarified what kinds of materials could *not* be found obscene under Ch. 38, §11-20 or any law, local or otherwise. In *People* v. *Romaine,* 38 Ill. 2d 325, 231 N.E. 2d 413 (1967) a conviction for selling the book "Fannie Hill" was reversed because it was found to have literary value, while in *People*

v. *Bruce,* 31 Ill. 2d 459, 202 N.E. 2d 497 (1964) a conviction for giving an obscene night club performance was reversed because, although it contained continual references to sexual intercourse, sex organs, and deviate sexual behavior, it included discussion of several socially important topics. The Illinois Appellate Court affirmed the dismissal of indictments charging violations of the State Obscenity Statute in selling nudist magazines in *People* v. *Biocic,* 80 Ill. App. 2d 65, 224 N.E. 2d 572 (1967). The court held that the photographs in question were not lewd and did not appeal to prurient interest.

Since 1972, several decisions have confirmed the above limitations on the Illinois Obscenity Statute, applying it only to materials which contain obscene matter as it was defined by this Court in *Miller*: depiction or description of sexual conduct in a patently offensive way. 413 U.S. at 25. In the Illinois Supreme Court's review of *People* v. *Ridens* I, 51 Ill. 2d 410, 282 N.E. 2d 691 (1972), the pictures found obscene portrayed nude males and females *engaged* in seductive embraces, posed with their legs spread so as to focus attention on their genitals. In many instances, the models had their hands or mouths close to another's genitals, suggestive of abnormal sexual conduct. The magazines in *People* v. *Gould,* 60 Ill. 2d 159, 324 N.E. 2d 412 (1975), depicted offensive sexual *conduct,* including lewd exhibitions of the genitals.

The Illinois Appellate Court affirmed obscenity convictions for sale of two magazines entitled "Bottom" and "Adult Words and Pictures" in *People* v. *Penney,* 287 N.E. 2d 220, 225 (Ill. App. Ct. 1st Dist. 1972). Stories in the magazines described rape, cunnilingus, intercourse, fellatio and lesbian acts in detail; pictures showed lewd exhibition of

the model's genitals, fondling and oral-genital contact. The court concluded:

> "Based upon our statutory definition of obscenity as implemented by the constitutional criteria, both of which we have previously set out, it is our conviction that the magazines described herein are obscene and without constitutional protection. We think their sole appeal is to the prurient interests. We think they are without any artistic or literary merit and totally devoid of any redeeming social value." 287 N.E. 2d at 225.

Casting light on how the Obscenity Statute should be applied in borderline cases, the Illinois Appellate Court, just prior to the issuance of this Court's Miller decision, held that a motion picture entitled "The Curse of Her Flesh" was not obscene. *People* v. *Burkhardt,* 297 N.E. 2d 694, 698 (Ill. App. Ct. 1st Dist. 1973). The trial court had ruled the movie obscene even though it found the picture not to be hard core pornography. Noting that the State's power to proscribe obscenity had to be narrowly construed in line "with Roth and its progeny" and was "constitutionally limited to hard-core pornography", *the Appellate Court ruled that the movie could not be obscene under Illinois law if it was not hard core pornography,* which it was not. 297 N.E. 2d at 698.

Thus, the Illinois construction of what is considered obscene under Ill. Rev. Stat., Ch. 38, §11-20 easily can be obtained from those Illinois Supreme Court and Appellate Court decisions cited above, which hold certain specific conduct or materials to be in violation of the statute. It was not necessary that the Opinions announce in so many words that they were construing the statute. It is apparent from the reasoning and results that they were doing so and that they have limited the Illinois Obscenity Statute's prohibition to

patently offensive materials falling into the category of hard core pornography.

B. Comparison With Other State Interpretations.

Based upon similar or less extensive historical interpretation of their obscenity statutes, several state high courts have held their laws to be in conformity with *Miller's* specificity requirement. Dealing with an obscenity definition almost identical to the one adopted by Illinois and challenged here, the Supreme Court of Virginia held that two of its earlier decisions had "narrowed this definition [of obscenity] by judicial construction" to include only "hard core pornography". *Price* v. *Commonwealth,* 201 S.E. 2d 798, 800 (Va. Sup. Ct., 1974), cert. denied, 419 U.S. 902 (1975). Five Texas obscenity opinions were found to have authoritatively construed a statute of the Model Penal Code, Illinois variety, so as to meet the *Miller* requirements in *West* v. *State,* 514 S.W. 2d 443, 445 (Tex. Ct. of Crim. Appeals, on Rehearing, 1974).[6] The New York Court of Appeals on remand from this court, found its obscenity statute to have already been properly limited to prohibition of hard core pornography in *People* v. *Heller,* 307 N.E. 2d 805, 813 (N.Y. Ct. of Appeals, Dec., 1973). The court cited six interpretive prior decisions and said no dictionary reference was necessary to understand the words "nudity", "sex", "excretion", "sadism" or "masochism" which "can be considered *malum in se* in terms of *commercial exploitation*". "The fact of an occasional close case serves as no basis for a declaration that the penal statute under which it is decided, is invalid." (citation omitted). 307 N.E. 2d at 813. The New

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[6] As have some other states, Texas' court then also construed the *Miller* examples into its statute.

York court went on to hold that its statute was easily interpreted as pertaining to hard core pornography and that the average man knows it when he sees it.

The California decision quoted approvingly by Wesley Ward (Appellant's Brief at 18) accomplished the same goal by holding that four previous Supreme and Appeals Court decisions had authoritatively construed its statute "so as to limit its reach to specifically defined sexual conduct". *People* v. *Enskat,* 33 Cal. App. 3d 900, 109 Cal. Rptr. 433, 438-39 (1973), cert. denied, 418 U.S. 937 (1975). These opinions relied upon for the California limiting interpretation are no more specific and informative about what the California obscenity statute prohibits than are the ten Illinois decisions from which can be obtained the needed interpretation of the almost-identical Illinois statute.

Also following *Miller,* Florida held that its broader obscenity statute as previously construed was sufficient to meet the *Miller* requirements of specificity to the person of ordinary understanding.

> "By clear and continuing judicial declarations we have for many years past "authoritatively construed" the statutory language of "lewd and lascivious." *We have said in plain, understandable language that these statutory words proscribe "an unlawful indulgence in lust; eager for sexual indulgence; open and public indecency" offensive to others.* Chesebrough v. State, 255 So.2d 675 (Fla. 1971), cert. den. 406 U.S. 976, 92 S.Ct. 2427, 32 L.Ed.2d 676, catalogues the earlier cases, although it was not decided until December 8, 1971, subsequent to the offense here.
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> Former 'authoritative construction' of the statute, announced in prior court decisions, which were of public notice at the time of the offense here, apply and were

> chargeable to appellant at the time of his offense. The record supports the convictions under these prior applicable judicial interpretations.
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> The courts have made as clear as reasonably necessary, the test of obscenity, if it is applied with common sense in accordance with facts. There will always be those who contend otherwise, whose only object is to continue their assertion of confusion and ambiguity and who are not really looking for a reasonable test or determination of obscenity but only wish to obscure the issue, to continue a state of confusion in which they may profit or pointlessly project their perfidious pursuit of perplexity." (Emphasis added; footnote omitted.) *Rhodes* v. *State,* 283 So.2d 351, 356 (Fla. Sup. Ct. 1973)

It should be noted that none of the above sets of interpretive state court decisions furnished an exhaustive list of every kind of physical conduct or depiction that might be considered obscene under their now limited obscenity statutes. Some of the interpretive sets provide must less detail than do Illinois' ten in-depth decisions, and yet they meet appellant's approval. The *Enskat* case was denied *certiorari* in 418 U.S. 937 (1975), although four Justices would have taken it and reversed, as was the *Price* case in 419 U.S. 902 (1975). See also *Slaton* v. *Paris Adult Theater* I, 201 S.E.2d 456, 459 (Ga. Sup. Ct. 1973), *cert. denied,* 418 U.S. 939 (1974).

The fact that the Illinois Supreme Court failed to accept the Attorney General's suggestion in *Ridens II* to interpret Ill. Rev. Stat., ch. 38, §11-20 as having been limited to hard core pornography in prior Illinois decisions, does not mean that such a construction was not possible. The court in *Ridens* II sought to incorporate the entire *Miller* standards and examples, Parts (a) and (b), into the Illinois law (see argument at Point II, *supra*). They obviously felt that an exposition of Illinois' prior limiting decisions was not neces-

sary on top of the specific incorporation of *Miller* requirements.

Since there exists sufficient judicial limitation on the scope of ch. 38, §11-20, it warrants constitutional approval as it is applied in Illinois, regardless of whether or not all the limiting precedents have been gathered together in one Supreme Court opinion as have the precedents of the states cited above.[7]

IV.

ILLINOIS LAW GAVE ADEQUATE NOTICE TO WESLEY WARD THAT THE MAGAZINES HE SOLD IN 1971 WERE OBSCENE; AFFIRMANCE OF HIS CONVICTION UNDER CH. 38, §11-20, AS NOW CONSTRUED, DOES NOT OFFEND DUE PROCESS.

Ill. Rev. Stat. (1971), ch. 38, §11-20(a)(1), (b) and (c), under which Wesley Ward was convicted for selling two obscene publications, contains much specificity in its definitions of the obscene and interpretations of evidence. Subsection (b) requires that materials be made to appeal to prurient interest and go beyond customary limits of candor in description or representation before they can be labeled obscene in the eyes of the law. Prurient interest is further defined as a shameful or morbid interest in nudity, sex or excretion. Subsection (c) sets up the ordinary adult as the reference point for determining obscenity and allows the court to consider the literary, etc., merits of the materials

[7] Of course, the decisions of other states not to rely on their prior opinions or the *Miller* examples to construe their obscenity statutes do not reflect adversely on the position taken by the above state courts and the State of Illinois. Some courts never applied an obscenity law in limiting fashion and others prefer to leave all reconstruction to their legislatures. This is simply a matter of state law and preference, which this Court indicated it was willing to respect in *Miller* and *Slaton*.

as well as the degree of their acceptance by the public in this State. Only commercial exploitation of obscene matter is made punishable. Many of the statute's phrases are similar to the wording of the *Miller* standards.

When this Obscenity Statute is read against the backdrop of Illinois reviewing court interpretations and applications, as it must be, its direction and scope are clear now, just as they were in 1971. Regardless of which constitutional standards have been employed to limit the statute, Illinois courts have consistently held that lewd, sado-masochistic portrayals of sex designed to arouse prurient interest were obscene. *People* v. *Sikora,* 204 N.E. 2d 768, 773 (Ill. Sup. Ct. 1965); *City of Blue Island* v. *DeVilbiss,* 242 N.E. 2d 761, 764 (Ill. Sup. Ct. 1969); *City of Chicago* v. *Geraci,* 264 N.E. 2d 153, 158 (Ill. Sup. Ct. 1970), quoted in Argument, Part III, *supra.*[8] The Statute and these cases put Illinois book sellers on notice in 1971 that sale of lewd, sado-masochistic magazines was forbidden. Of course lewd exhibition of the genitals in any context is obscene under the Illinois decisions and *Miller* v. *California's* examples, 413 U.S. at 23-25.

[8] Among those jurisdictions that forbid the sale of obscene publications, there appears to be a national consensus that lewd, sado-masochistic portrayals of sex are obscene and prohibitable under the First Amendment. See: New York statute cited in *People* v. *Heller,* 307 N.E. 2d at 811, note 3; Louisiana Stats., Ch. 1, §14:106 reprinted in Appellant's Brief at 25; Oregon Laws 1971, ch. 743, Art. 29, §§255-262 (Codified as ch. 743, §167.060 et seq.) cited with approval in this Court's *Miller* decision at p. 24, note 6; 9 Maine Rev. Stat. Annotated (1976 Supp.), Title 17, ch. 93, §2901; Rev. Code of Wash. Annotated (1975), ch. 9.68, §.050; Code of Iowa (1975), ch. 725 as re-amended by Senate File 85, §2804 passed May 28, 1976, and signed June 28, 1976 (reprohibiting the sale of certain obscene materials, including those involving sado-masochistic abuse).

As described in the State's Motion to Dismiss or Affirm filed herein, the publications underlying Wesley Ward's conviction contain the following:

> " 'Illustrated Case Histories, A Study of Sado-Masochism,' consists of black and white and color photographs portraying nude males and females engaged in seductive embraces, posed so as to focus attention on their genitals. Sexual activity is suggested and imminent in most of the photographs. The models have their hands and mouths close to, or touching each other's genitals, suggesting abnormal sexual activity. Chains, ropes, whips, cigarettes, scissors, etc., are portrayed in the photographs in connection with such sexual activities. Captions are included with many of the pictures extolling the virtues of sex accompanied by physical torture.
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> 'Bizarre Word, Number One,' consists of black and white and color photographs of partially clothed and naked males and females. Some of the pictures suggest that sexual activity is imminent. (See 'Bizarre World, Number One' at pp. 34, 70). Many of the photographs focus on the genitals of the models, and in some, whips are shown against the male genitals. Using whips, ropes, high heeled shoes, nets, male and female models, captions and articles, the magazine attempts to advance the cause of sex accompanied by torture." State's Motion to Dismiss Or Affirm, p. 8.

The State of Illinois submits that these publications are and always have been considered hard-core pornography under Ill. Rev. Stat., ch. 38, §11-20, as construed. Regardless of whether the constitutional standards of *Roth* v. *United States, Memoirs* v. *Massachusetts,* or *Miller* v. *California* are applied, the above described magazines are obscenity unprotected by the First Amendment.

The present criminal conviction based upon sale of materials deemed hard core pornography under *Miller and*

older standards is not effected by a re-construction of ch. 38, §11-20 from the Illinois Supreme Court, pursuant to *Miller,* Parts (a) and (b). See: *United States* v. *Hamling,* 418 U.S. 87, 100-102 (1974); *J-R Distributors, Inc.* v. *Washington,* 418 U.S. 949, 952 (Opinion of Mr. Justice White, July 25, 1974, on denial of certiorari); *United States* v. *Dachsteiner,* 518 F. 2d 20, 23 (9th Cir. 1975), cert. denied, 95 S.Ct. 1688; *United States* v. *New Orleans Book Mart,* 490 F. 2d 73, 75 (5th Cir. 1974), cert. dismissed 419 U.S. 801 (1975); *United States* v. *Alexander,* 498 F. 2d 934, 936 (2nd Cir. 1974); *Pierce* v. *State,* 296 So. 2d 218, 222 (Sup. Ct. of Alabama 1974), cert. denied, 419 U.S. 1130 (1975);[9] *West* v. *State,* 514 S.W. 2d 433, 445 (Tex. Ct. of Crim. Appeals, 1974).

This Court's Due Process Clause decisions do not prevent application of a state statute's obscenity definition, as authoritatively construed to include the specific examples of prohibited conduct listed in *Miller* v. *California,* 413 U.S. 15 (1973), to a sale of materials that occurred before *Miller. Hamling* v. *United States,* 418 U.S. 87, 115-116 (1974). As this Court recently stated in explaining the *Hamling* decision and distinguishing it from *Bouie* v. *City of Columbia,* 378 U.S. 347 (1964), the *Miller* standard's part (b) (obscenity definition) did *not* expand the reach of the more broadly worded obscenity statutes to

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[9] Faced with a much broader obscenity statute and a dearth of appellate decisions which might construe and narrow it to specific conduct, the Supreme Court of Alabama nevertheless found that all persons had been put on notice, at least that magazines which contained lewd photographs or descriptions of female genitals were subject to the obscenity statute, since these materials had been declared obscene using federal standards and applying the state statute in an earlier Alabama decision. *Pierce* v. *State,* 296 So. 2d 218, 222 (1974).

which it was to be applied; the same, of course, cannot be said of part (c) of the *Miller* test which is not involved in the present appeal. *Marks et al.* v. *United States,* ..... U.S. ....., 45 L.W. 4233, 4235, note 10 (Mar. 1, 1977). The *Miller* enumeration of categories of material which might be found obscene did not purport to criminalize conduct which had not previously been thought criminal under the Illinois obscenity definition, Ill. Rev. Stat., ch. 38, §11-20. See *Marks* v. *United States, supra,* at 4235, note 10.

The state court decisions that appellant cites for the point that a limiting construction placed on an obscenity statute pursuant to *Miller* can be constitutionally applied only prospectively are wrongly decided, as shown in the *Hamling* and *Marks* rulings. Some state decisions that their obscenity laws must be declared unconstitutional are founded also on the false premise that the specificity requirements of *Miller,* Parts (a) and (b) may not be retroactively applied.

In the present case, Wesley Ward had notice in 1971 that the Illinois Obscenity Statute forbade the sale of magazines depicting men or women being tortured while their private organs were lewdly displayed, to excite the prurient interest of readers. Under the Illinois decisions cited in Argument, Part III, *supra,* as later under *Miller,* there was notice to magazine sellers that "hard-core pornography" was not to be sold to the public without incurring criminal liability. The question of whether Wesley Ward had specific notice as to the outer limits of criminality in the area of "soft-core pornography" is not relevant to this appeal, since the materials he was convicted of selling were clearly prohibited under any reasonable application of the Illlinois obscenity statute, no matter how broadly or narrowly it is construed. Thus, specific application of Parts (a) and (b) of *Miller* to his case would not have benefited Wesley Ward or brought about a different result in his prosecution.

CONCLUSION

In the above citations and argument, the State of Illinois has demonstrated that Ill. Rev. Stat., ch. 38, §11-20(b) had been construed before 1972 by Illinois reviewing courts as prohibiting specific types of hard core pictorial pornography, not merely nudity. Nevertheless, the Supreme Court of Illinois sought to ensure conformity to the principles of this Court's *Miller* decision by incorporating its standards (a) and (b), with specific examples, into Illinois obscenity law. The magazines Wesley Ward was convicted of selling are correctly found to be obscene under both the older Illinois limiting constructions and the new *Miller* inspired construction of the statute. Consequently, Wesley Ward has suffered no constitutional deprivation from his conviction under Ill. Rev. Stat. (1971), ch. 38, §11-20. The decision of the Supreme Court of Illinois upholding his conviction should be affirmed.

Respectfully submitted,

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